TEXAS REGISTER

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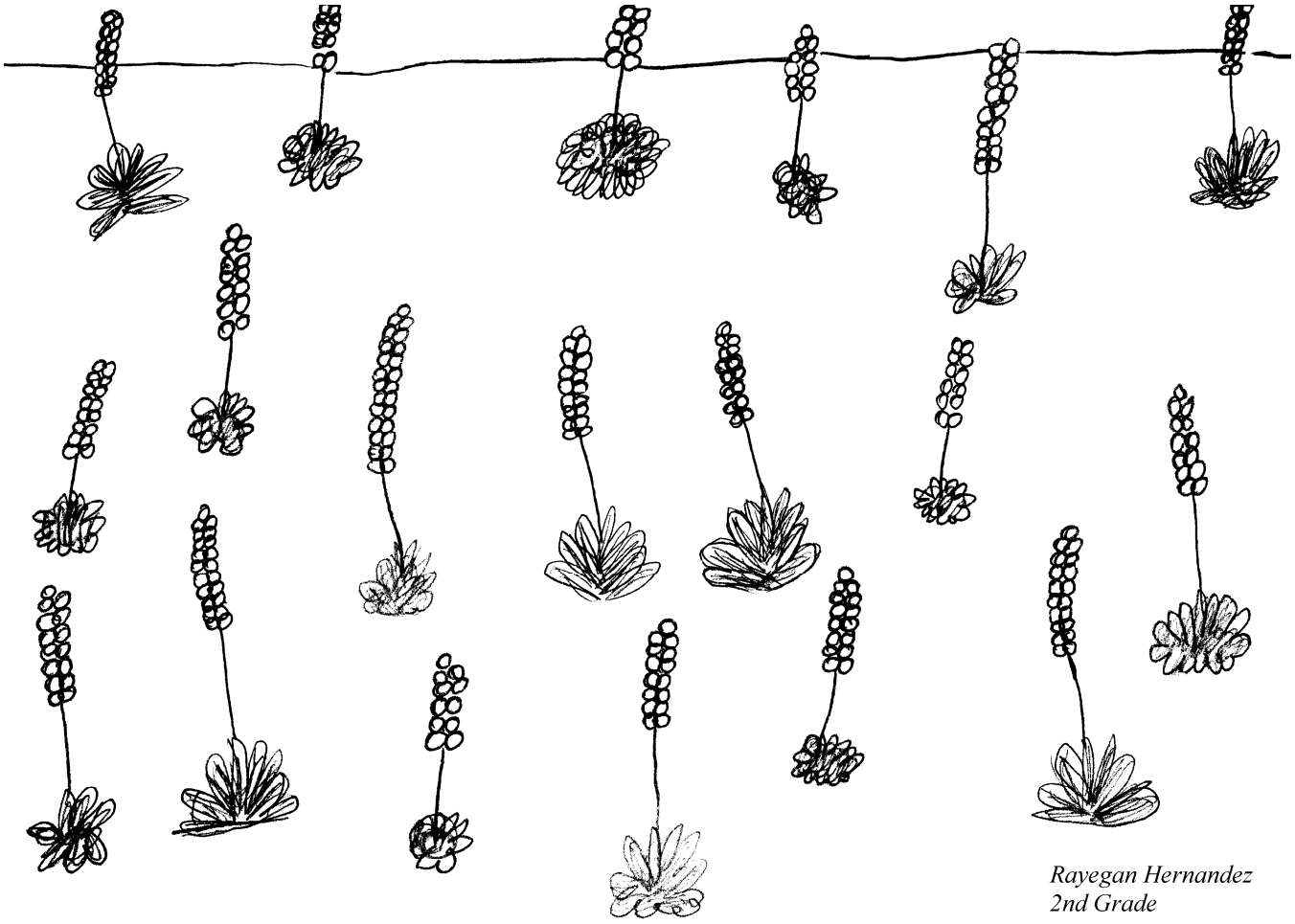

Rayegan Hernandez
2nd Grade

School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

The artwork featured on the front cover is chosen at random. Inside each issue, the artwork is published on what would otherwise be blank pages in the *Texas Register*. These blank pages are caused by the production process used to print the *Texas Register*.

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IN THIS ISSUE

ATTORNEY GENERAL

PROPOSED RULES

IN ADDITION

Open Meetings

Statewide agencies and regional agencies that extend into four or more counties post meeting notices with the Secretary of State.

Meeting agendas are available on the *Texas Register*'s Internet site:
http://www.sos.state.tx.us/open/index.shtml

Members of the public also may view these notices during regular office hours from a computer terminal in the lobby of the James Earl Rudder Building, 1019 Brazos (corner of 11th Street and Brazos) Austin, Texas. To request a copy by telephone, please call 463-5561 in Austin. For out-of-town callers our toll-free number is 800-226-7199. Or request a copy by email: register@sos.state.tx.us

For items ***not*** available here, contact the agency directly. Items not found here:

- minutes of meetings
- agendas for local government bodies and regional agencies that extend into fewer than four counties
- legislative meetings not subject to the open meetings law

The Office of the Attorney General offers information about the open meetings law, including Frequently Asked Questions, the *Open Meetings Act Handbook*, and Open Meetings Opinions.
http://www.oag.state.tx.us/opinopen/opengovt.shtml

The Attorney General's Open Government Hotline is 512-478-OPEN (478-6736) or toll-free at (877) OPEN TEX (673-6839).

Additional information about state government may be found here:
http://www.state.tx.us/

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Meeting Accessibility. Under the Americans with Disabilities Act, an individual with a disability must have equal opportunity for effective communication and participation in public meetings. Upon request, agencies must provide auxiliary aids and services, such as interpreters for the deaf and hearing impaired, readers, large print or Braille documents. In determining type of auxiliary aid or service, agencies must give primary consideration to the individual's request. Those requesting auxiliary aids or services should notify the contact person listed on the meeting notice several days before the meeting by mail, telephone, or RELAY Texas. TTY: 7-1-1.

THE ATTORNEY GENERAL

The *Texas Register* publishes summaries of the following: Requests for Opinions, Opinions, Open Records Decisions.

An index to the full text of these documents is available from the Attorney General's Internet site http://www.oag.state.tx.us. Telephone: 512-936-1730. For information about pending requests for opinions, telephone 512-463-2110.

An Attorney General Opinion is a written interpretation of existing law. The Attorney General writes opinions as part of his responsibility to act as legal counsel for the State of Texas. Opinions are written only at the request of certain state officials. The Texas Government Code indicates to whom the Attorney General may provide a legal opinion. He may not write legal opinions for private individuals or for any officials other than those specified by statute. (Listing of authorized requestors: http://www.oag.state.tx.us/opinopen/opinhome.shtml.)

Request for Opinions

RQ-0698-GA

Requestor:

The Honorable Jeff Wentworth

Chair, Committee on Jurisprudence

Texas State Senate

Post Office Box 12068

Austin, Texas 78711

Re: Whether the media exception to the Public Information Act, section 552.275(j), Government Code, applies to a requestor who holds an amateur radio license issued by the Federal Communications Commission (RQ-0698-GA)

Briefs requested by May 19, 2008

RQ-0699-GA

Requestor:

The Honorable Richard J. Miller

Bell County Attorney

Post Office Box 1127

Belton, Texas 76513

Re: Constitutionality of sections 143.025(k) and 143.1041, Local Government Code, which authorizes a police department in a municipality of 1.5 million or more to administer a civil service examination to a police officer after the officer is admitted to a police officer training academy (RQ-0699-GA)

Briefs requested by May 19, 2008

RQ-0700-GA

Requestor:

The Honorable Sherri K. Tibbe

Hays County Criminal District Attorney

Hays County Justice Center

110 East Martin Luther King

San Marcos, Texas 78666

Re: Authority of a county bail bond board to suspend or revoke an individual surety license for that licensee's activity relating to an out-of-county bond (RQ-0700-GA)

Briefs requested by May 23, 2008

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200802127
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: April 22, 2008

♦ ♦ ♦

Opinions

Opinion No. GA-0615

The Honorable Phil King

Chair, Committee on Regulated Industries

Texas House of Representatives

Post Office Box 2910

Austin, Texas 78768-2910

Re: Whether a limit on increases to annual earnings used in calculation of retirement benefits of vested employees of the City of Fort Worth contravenes article XVI, section 66 of the Texas Constitution (RQ-0632-GA)

S U M M A R Y

Texas Constitution article XVI, section 66(d) generally prohibits a change in retirement benefits of a non-statewide retirement system that reduces or otherwise impairs "benefits accrued" by persons eligible to receive such benefits, without accumulating additional service, on or after the effective date of the change. Based on a review of the constitutional text and purpose and case law from other jurisdictions construing similar constitutional limits, we construe article XVI, section 66(d) to prohibit a change in the method of determining the compensation base of vested employees if such action reduces or impairs retirement benefits that the employee would have been eligible to receive before the effective date of the change. Accordingly, the City of Fort Worth's recently adopted 12% cap on increases in earnings used to determine the compensation base for calculating retirement benefits contravenes article XVI, section 66(d) to the extent it reduces

or impairs retirement benefits that vested employees would have received before the effective date of the change.

Opinion No. GA-0616

The Honorable Homero Ramirez

Webb County Attorney

Post Office Box 420268

Laredo, Texas 78042-0268

Re: Whether a county and school districts in the county may jointly develop or sell rights to the natural resources located on county school lands (RQ-0636-GA)

S U M M A R Y

Article VII, section 6 of the Texas Constitution does not allow a county to cede or share its authority and responsibilities as sole trustee of county school land and the county permanent school fund. Thus, a county and school districts in the county may not "jointly" develop or sell rights to natural resources and minerals in county school land by forming a joint venture, a local government corporation, or other association to exercise the county's constitutional authority. A county or school district may not recoup expenses to develop or sell natural resources and mineral rights in county school land from subsequent proceeds or income from such land. The county and the school districts in the county may not share in the revenue realized from the sale of natural resources and mineral rights in such land.

Opinion No. GA-0617

The Honorable Don McLeroy, D.D.S.

Chair, State Board of Education

William B. Travis Building

1701 North Congress Avenue

Austin, Texas 78701-1494

Re: Constitutionality of section 51.413, Natural Resources Code, which would authorize the School Land Board to transfer proceeds from the sale of land in the permanent school fund to the available school fund (RQ-0638-GA)

S U M M A R Y

The perpetual school fund, the public free school fund, and the permanent school fund referred to in Texas Constitution sections 2, 4, and 5 of article VII constitute the same fund, most commonly known as the permanent school fund. When the State Board of Education invests assets of the permanent school fund, it should consider the School Land Board's investments and their potential impact on the probable income and the probable safety of the permanent school fund. When the School Land Board engages in transactions with interests in the real estate special fund account, it must consider the best interest of the permanent school fund including investments by the State Board of Education. Natural Resources Code section 51.413(1), which attempts to place the proceeds of land sales in the available school fund, appears to be inconsistent with Texas Constitution article VII, sections 4 and 5. A court would probably find section 51.413(1) unconstitutional.

Opinion No. GA-0618

The Honorable Dan W. Heard

Calhoun County Criminal District Attorney

211 South Ann Street

Port Lavaca, Texas 77979

Re: Authority of a county auditor to refuse payment to a former employee of a county hospital on the ground that such payment is unconstitutional (RQ-0640-GA)

S U M M A R Y

The bills and accounts of a county hospital must be certified by the hospital's board of managers and transmitted to the county commissioners court. All bills and accounts, including salaries and wages, of a county hospital are paid in the same manner as charges made against a county, which charges must be approved by the county auditor and paid by order of the commissioners court. The county auditor has authority to determine whether any proposed payment strictly complies with the law. The county auditor, in an exercise of reasonable discretion, may refuse to approve a payment on the grounds that it is unconstitutional. As between the county hospital board of managers and county auditor, a court would be the final arbiter of whether the payment satisfied the constitution

For further information, please access the website at www.oag.state.tx.us or call the Opinion Committee at (512) 463-2110.

TRD-200802126
Stacey Napier
Deputy Attorney General
Office of the Attorney General
Filed: April 22, 2008

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PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

Symbols in proposed rule text. Proposed new language is indicated by underlined text. [~~Square brackets and strikethrough~~] indicate existing rule text that is proposed for deletion. "(No change)" indicates that existing rule text at this level will not be amended.

TITLE 1. ADMINISTRATION

PART 5. TEXAS FACILITIES COMMISSION

CHAPTER 115. FACILITIES LEASING PROGRAM

SUBCHAPTER A. STATE LEASED PROPERTY

1 TAC §§115.1 - 115.3, 115.8, 115.10, 115.13

Introduction and Background.

During its rule review, published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9735), the Texas Facilities Commission (Commission) has reviewed and considered Texas Administrative Code, Title 1, Chapter 115 for readoption, revision, or repeal, in accordance with the Texas Government Code §2001.039 (Vernon 2000). The Commission determined that Texas Administrative Code, Title 1, §§115.1 - 115.3, 115.8 and 115.10, which govern leasing facilities for the use and benefit of state agencies are still necessary. Revisions to these rules, however, are required to reflect the agency's name change, to delete definitions no longer in use, and to correct typographical errors, including reformatting. In addition, staff identified the necessity for a new §115.13, entitled *Best Value Guidelines*, which is proposed to comply with statutory rulemaking requirements. See Texas Government Code, §2167.0021(b) (Vernon Supp. 2007). In a concurrent miscellaneous notice, the Commission announces its intent to readopt Texas Administrative Code, Title 1, §§115.1 - 115.3, 115.8 and 115.10 with amendments and to propose a new §115.13. The rule amendments are proposed pursuant to the rulemaking authority granted to the Commission in Texas Government Code, §2167.0021(b) (Vernon 2000) and §2167.008 (Vernon Supp. 2007).

Section by Section Summary.

Proposed revisions to existing rules are required to reflect the agency's name change, to delete definitions no longer in use, to correct typographical errors, and include reformatting. Section 115.1 defines terms used in this chapter. Section 115.2 establishes prerequisites to leasing space, such as state agency requests for lease space and certification of availability of funds. Section 115.3 specifically addresses requests for leasing space by Health and Human Services Commission agencies. Section 115.8 imposes certain requirements on private firms used by the Commission to obtain lease space, including disclosure of any potential conflicts of interest. Section 115.10 discusses tenant agency responsibilities and reporting with respect to leased space. Also, pursuant to statutory rulemaking requirements, a new §115.13, entitled *Best Value Guidelines*, is added to outline in greater detail the factors considered when the Commission evaluates responses to solicitations associated with the procurement of lease space for the use and benefit of state agencies under Texas Government Code, Chapter 2167 and makes a best value determination on which a solicitation award is based.

Fiscal Note.

Edward L. Johnson, Executive Director, has determined that for each year of the first five-year period the proposed rules are in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the proposed rules.

Public Benefit/Cost Note.

Mr. Johnson has also determined that for each year of the first five-year period the proposed rules are in effect the public benefit will be further clarification by updating the references to the Commission and internet websites, omission of definitions no longer in use, and correction of typographical errors.

Mr. Johnson has further determined that there will be no effect on individuals or large, small, and micro-businesses as a result of the proposed rules. Consequently, an Economic Impact Statement and Regulatory Flexibility Analysis, pursuant to Texas Government Code, §2006.002 (Vernon Supp. 2007), are not required.

In addition, Mr. Johnson has determined that for each year of the first five-year period the proposed rules are in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Administrative Procedure Act, Texas Government Code, §2001.022 (Vernon Supp. 2007).

Request for Comments.

Interested persons may submit written comments on the proposed rules to General Counsel, Legal Services Division, Texas Facilities Commission, P.O. Box 13047, Austin, TX 78711-3047. Comments may also be sent via email to rulescomments@tfc.state.tx.us. For comments submitted electronically, please include "Proposed Facilities Leasing Program" in the subject line. Comments must be received no later than thirty (30) days from the date of publication of the proposal to the *Texas Register*. Comments should be organized in a manner consistent with the organization of the proposed rule. Questions concerning the proposed new rules may be directed to Ms. Susan Maldonado, Assistant General Counsel, at (512) 463-3960.

Statutory Authority.

The amended rules are proposed under Texas Government Code, Title 10, Subtitle D, §2167.0021(b) (Vernon 2000) and §2167.008 (Vernon Supp. 2007).

Cross Reference to Statute.

The statutory provisions affected by the proposed rules are those set forth in Chapter 2167 of the Texas Government Code.

§115.1. Definitions.

The following words and terms, when used in this chapter [~~subchapter~~], shall have the following meanings, unless the context clearly indicates otherwise:

(1) Commission--The Texas Facilities Commission. [~~Building and Procurement Commission.~~]

[~~(2) Negotiated Lease-- A lease negotiated directly with a public or private entity on behalf of the State by the Commission or its tenant representative.~~]

[~~(3) Request for Proposal (RFP)-- A procurement for lease space conducted by the Commission or its tenant representative through a public process under the guidelines set forth by procedures established by the Leasing Division and approved by the Commission.~~]

(2) [~~(4)~~] State agency or agency--A board, a commission, or agency established by the Texas Legislature.

§115.2. Prerequisites for Leasing Space.

(a) When a board, commission or agency requests to lease property that is not owned by the state, the Commission shall verify that state-owned space is not available.

(b) All requests for lease space must be submitted by the office of the Executive Director or designated the agency representative head of the requesting agency party.

(c) The Chief Administrative Officer of the requesting agency must certify the availability of funds for the requested lease space, the number of full time employees to be located at the requested space and the agency's projected schedule.

(d) The requesting agency shall not submit any specifications that would:

(1) Unnecessarily limit meaningful competition for the requested space;

(2) Unnecessarily increase the cost of the lease;

(3) Exceed the authorized space limitations established by the Commission; or

(4) Require more than is reasonably necessary to carry out the business mandated to the requesting agency.

[~~(d) §2165.104(c) of the Texas Government Code does not exempt any state entity from statutorily imposed lease space restrictions. All requests for space exemptions from state statute or rule shall be determined on a case by case basis by the Commission. No exemption granted by the Commission will be considered as a precedent for any future exemption requests.~~]

§115.3. Leasing Space for Health and Human Services Agencies.

(a) All requests for lease space by Health and Human Services Commission (HHSC) agencies must be submitted by the office of the Executive Commissioner.

(b) The Chief Administrative Officer of HHSC, or a designated representative, shall certify the availability of funds for the requested lease space, the number of full time employees to be located at the requested lease space and the agency's projected schedule.

§115.8. Use of Private Firms to Obtain Space.

(a) Any entity that provides lease services to the Commission shall immediately disclose any conflict of interest in a transaction to all parties [~~,~~] and shall withdraw from all matters related to the conflict. Final determination of a conflict of interest shall be made by the Commission.

(b) No broker, real estate firm, tenant representative or entity representing the state as an agent in a leasing matter may, during the term of the agency, simultaneously represent, participate or profit from the actions of buyers, sellers, owners or any other entity that possess an interest in any lease in which the Commissioner is the lessor.

§115.10. Tenant Agency Responsibility; Reporting.

(a) No state agency occupying state leased space shall commit any act or action that may endanger the State's interest under the lease contract.

(b) Any state agency that the Commission determines has acted in bad faith against the State's interest, or is in noncompliance as referenced in §2167.105 of the Government Code, shall be reported to the Governor, Lieutenant [~~Lt.~~] Governor, Office of the Speaker of the House [~~,~~] of Representatives, the House Committee on Appropriations, [~~the Office of Lt. Governor~~] and the Senate Committee on Finance.

§115.13. Best Value Guidelines.

(a) The Commission shall develop procedures, deadlines, site analyses and market analyses to ensure that recommendations for lease procurements reflect the best value to the State of Texas.

(b) In determining the specific procedures to be used to evaluate the properties and identification of the best value to the state, the Commission shall develop and maintain documents in the permanent lease file of the Commission detailing its evaluation of each of the following criteria for all qualified sites selected for final consideration:

(1) analysis of the total cost of occupancy offered by the proposed Lessor;

(2) utility costs;

(3) age, type and condition of the premises;

(4) costs, if any, of improvements required to meet the approved agency specifications;

(5) location of the property and access to public facilities and transportation;

(6) access to and cost of parking;

(7) security premises;

(8) space planning considerations including implementation of the Facilities Master Plan and space consolidation options;

(9) direct and indirect costs of relocation; and

(10) any other considerations relevant to the approved agency specifications and existing market conditions.

(c) Prior to making any recommendation to the Commission, an assessment of the proposed Lessor shall be performed to determine the relevant experience, financial condition, and history of bankruptcy, litigation and judgments involving the proposed Lessor, and, as appropriate, its owners, officers, directors, subsidiaries, affiliates, or predecessors that may be relevant indicators of proposed Lessor's ability to perform under the lease contract. The findings of this inquiry shall be maintained in the permanent lease of the Commission.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802019
Kay Molina
General Counsel
Texas Facilities Commission
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 463-7220

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PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 352. QUALITY ASSURANCE FEE

1 TAC §352.10

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Health and Human Services Commission or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Texas Health and Human Services Commission (HHSC) proposes the repeal of §352.10, Quality Assurance Fee for the Home and Community-based Services and Community Living Assistance and Support Services waiver programs, under Title 1, Part 15, Chapter 352.

Background and Justification

Senate Bill (S.B.) 1830, 79th Legislature, Regular Session, 2005, required the Executive Commissioner of HHSC to impose a quality assurance fee (QAF) on persons providing services under the home and community-based services (HCS) waiver and community living assistance and support services (CLASS) waiver. However, Section 1 of S.B. 1830 included a requirement that if HHSC determined that the imposition of the QAF would not entitle Texas to receive additional federal Medicaid matching funds, the QAF would be discontinued.

Section 352.10, regarding the Quality Assurance Fee for the Home and Community-based Services and Community Living Assistance and Support Services, was adopted effective February 27, 2006 (31 TexReg 1017). The QAF was not implemented, however, pending confirmation from the Centers for Medicare and Medicaid Services (CMS) that the imposition of this QAF would entitle Texas to additional Medicaid matching funds under 42 C.F.R. §§433.55 - 433.68. On the basis of its discussions with CMS and the explanatory preamble to the CMS final rule on Health Care-Related Taxes, HHSC has determined that this QAF would not qualify for matching funds under §§433.55 - 433.68 of Title 42 of the Code of Federal Regulations. The CMS final rule appeared in the *Federal Register* on February 22, 2008 (73 FedReg 9685) Based on its discussion with CMS and the final CMS rule, HHSC is proposing to repeal §352.10.

Section-by-Section Summary

This proposal repeals §352.10.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the repeal is in effect there will be no fiscal impact to state government. The repeal will not result in any fiscal implications for local health and human services agencies.

There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the repeal. The implementation of the proposed repeal does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this repeal. The repeal will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the repeal is in effect, the expected public benefit is that rule language that will never be implemented will be eliminated.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at 512-491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The repeal is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The repeal affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§352.10. Quality Assurance Fee for the Home and Community-based Services and Community Living Assistance and Support Services.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 15, 2008.

TRD-200801963
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 424-6900

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CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER A. COST DETERMINATION PROCESS

1 TAC §355.105

The Health and Human Services Commission (HHSC) proposes amendments to §355.105, concerning General Reporting and Documentation Requirements, Methods, and Procedures.

Background and Justification

This rule establishes cost reporting and documentation requirements, methods and procedures for all Department of Aging and Disability Services (DADS) programs for which the Health and Human Services Commission (HHSC) administers rates. HHSC, under its authority and responsibility to administer and implement rates, is updating this rule by clarifying certain requirements relating to continuous daily timesheets and detailing the procedures for determining limits on related-party salaries, wages and benefits.

Continuous daily timesheets are required when a provider directly charges payroll costs of direct care employees who work across cost areas, service areas and/or job classifications. Existing rules do not detail the content requirements for these timesheets. This proposed rule will give providers clear guidance as to what information must be included in a timesheet to be acceptable for cost report documentation purposes.

Currently, HHSC applies salary caps to salary amounts reported on Medicaid cost reports by providers for related-party administrators, directors, assistant administrators, assistant directors, and owners, partners and stockholders. The salary caps are applied by HHSC under the authority of §355.102, which requires that, for cost reporting purposes, allowable costs must be reasonable and necessary, and, for nursing facilities (NFs), under the authority of §355.306, which describes the capping methodology in detail. The proposed rule creates a consolidated related-party salary capping rule for all DADS programs in a single Texas Administrative Code (TAC) section and codifies the methodology used to calculate these caps for all programs. This proposed amendment will ensure that the calculation of related-party compensation limitation for non-NF programs is described as clearly in the rules as is the calculation of such limitations for the NF program. The proposed rule does not change the current method used to cap related-party salaries on the cost report, the rule change only serves to clarify and consolidate current practice into the rule.

The proposed amendment also deletes obsolete language, deletes the requirement that legacy Texas Department of Mental Health and Mental Retardation providers maintain financial records for five years and instead requires these providers to comply with DADS record keeping requirements that financial records be maintained for three years and 30 days, updates agency references and updates references to other sections of the TAC. These changes will make the rule easier to understand and apply.

Section-by-Section Summary

The amendment revises §355.105 to:

Revise subsection (b)(2)(A)(i) to replace references to the legacy Texas Department of Human Services and DHS with references to the Texas Department of Aging and Disability Services and DADS. The paragraph is also revised to correct an erroneous reference to another section of the TAC.

Revise subsection (b)(2)(A)(ii) to delete references to the legacy Texas Department of Mental Health and Mental Retardation (MHMR) and specific records retention requirements for providers contracted with (MHMR).

Delete the language in subsection (b)(2)(A)(iv) as obsolete and renumber subsection (b)(2)(A)(v) as subsection (b)(2)(A)(iv).

Delete obsolete language in subsection (b)(2)(B)(iv) pertaining to luxury vehicles leased prior to January 1, 1997.

Add new subsection (b)(2)(B)(xii)(I) which details requirements for continuous daily timesheets for staff required to maintain such time sheets as per §355.102(j).

Add new subsection (b)(2)(B)(xii)(II) to describe which employees in the Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services and Texas Home Living programs are required to maintain continuous daily time sheets.

Delete obsolete language in subsection (b)(4)(vii) pertaining to cost reports from 1997 and 2004.

Delete the language in subsection (b)(4)(B)(ii) as obsolete renumber subsection (b)(4)(B)(iii) as subsection (b)(4)(B)(ii).

Delete the language in subsection (b)(4)(C)(ii) as obsolete and renumber subsection (b)(4)(C)(iii) as subsection (b)(4)(C)(ii).

Delete obsolete language in subsection (b)(5) pertaining to reporting periods beginning on September 1, 2001.

Delete the language in subsection (f)(2) as obsolete and renumber subsection (f)(3) as subsection (f)(2).

Add new subsection (i) which details procedures for determining limits on related-party salaries, wages and/or benefits.

Fiscal Note

Gordon E. Taylor, Chief Financial Officer for the Department of Aging and Disability Services, has determined that during the first five-year period the amended rule is in effect there will be no fiscal impact to state government. The proposed rule will not result in any fiscal implications for local health and human services agencies. There are no fiscal implications for local governments as a result of enforcing or administering the section.

Small Business and Micro-business Impact Analysis

HHSC has determined that there is no adverse economic effect on small businesses or micro-businesses as a result of enforcing or administering the amendment. The implementation of these proposed rule amendments does not require any changes in practice or any additional cost to the contracted provider.

HHSC does not anticipate that there will be any economic cost to persons who are required to comply with this amendment. The amendment will not affect local employment.

Public Benefit

Carolyn Pratt, Director of Rate Analysis, has determined that, for each of the first five years the amendment is in effect, the expected public benefit is that obsolete rule language will be eliminated and that the rule will provide clear guidance to agency staff and providers on time sheet documentation requirements and the calculation of related-party salary limitations.

Takings Impact Assessment

HHSC has determined that this proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

Regulatory Analysis

HHSC has determined that this proposal is not a "major environmental rule" as defined by §2001.0225 of the Texas Government Code. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

Public Comment

Questions about the content of this proposal may be directed to Pam McDonald in the HHSC Rate Analysis Department by telephone at (512) 491-1373. Written comments on the proposal may be submitted to Ms. McDonald by facsimile at (512) 491-1998, by e-mail to pam.mcdonald@hhsc.state.tx.us, or by mail to HHSC Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200, within 30 days of publication of this proposal in the *Texas Register*.

Statutory Authority

The amendment is proposed under Texas Government Code §531.033, which authorizes the Executive Commissioner of HHSC to adopt rules necessary to carry out the commission's duties; Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which provide HHSC with the authority to administer the federal medical assistance (Medicaid) program in Texas; and Texas Government Code §531.021(b), which establishes HHSC as the agency responsible for adopting reasonable rules governing the determination of fees, charges, and rates for medical assistance payments under the Human Resources Code, Chapter 32.

The amendment affects Texas Government Code Chapter 531 and Texas Human Resources Code Chapter 32. No other statutes, articles, or codes are affected by this proposal.

§355.105. General Reporting and Documentation Requirements, Methods, and Procedures.

(a) (No change.)

(b) Cost report requirements. Unless specifically stated in program rules, each provider must submit financial and statistical information on cost report forms provided by HHSC, or on facsimiles that are formatted according to HHSC specifications and are pre-approved by HHSC staff, or electronically in HHSC-prescribed format in programs where these systems are operational. The cost reports must be submitted to HHSC in a manner prescribed by HHSC. The cost reports must be prepared to reflect the activities of the provider while delivering contracted services during the fiscal year specified by the cost report. Cost reports or other special surveys or reports may be required for other periods at the discretion of HHSC. Each provider is responsible for accurately completing any cost report or other special survey or report submitted to HHSC.

(1) (No change.)

(2) Recordkeeping and adequate documentation. There is a distinction between noncompliance in recordkeeping, which equates with unauditability of a cost report and constitutes an administrative contract violation or, for the Nursing Facility program, may result in vendor hold, and a provider's inability to provide adequate documentation, which results in disallowance of relevant costs. Each is discussed in the following paragraphs.

(A) Recordkeeping. Providers must ensure that records are accurate and sufficiently detailed to support the legal, financial, and other statistical information contained in the cost report. Providers must maintain all workpapers and any other records that support the information submitted on the cost report relating to all allocations, cost centers, cost or statistical line items, surveys, and schedules. HHSC may require supporting documentation other than that contained in the cost report to substantiate reported information.

(i) For Texas Department of Aging and Disability [~~Human~~] Services (DADS)- [~~(DHS)~~] contracted providers, each provider must maintain records according to the requirements stated in 40 TAC §69.158 [~~§69.205~~] (relating to How long must contractors, subrecipients, and subcontractors keep contract-related records? [~~Contractor's Records~~]) and according to the HHSC's prescribed chart of accounts, when available.

(ii) [~~For Texas Department of Mental Health and Mental Retardation (TDMHMR) contracted providers, contractors must keep financial and supporting documents, statistical records, and any other records pertinent to the services for which a claim or cost report is submitted to HHSC. The records and documents must be kept for a minimum of five years after the end of the reporting period. If any litigation, claims, or audit involving these records begins before the five-year period expires, the contractor must keep the records and documents for not less than five years or until all litigation, claims, or audit findings are resolved.~~] If a contractor is terminating business operations, the contractor must ensure that:

(I) - *(II)* (No change.)

(iii) (No change.)

~~[(iv)~~ ~~For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to maintain all workpapers and any other records that support the information submitted on the cost report relating to all allocations, cost centers, cost or statistical line items, surveys and schedules constitutes an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title (relating to Administrative Contract Violations).]~~

(iv) [~~(v)~~] For all other programs, failure to maintain all workpapers and any other records that support the information submitted on the cost report relating to all allocations, cost centers, cost or statistical line items, surveys and schedules constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title (relating to Administrative Contract Violations).

(B) Adequate documentation. To be allowable, the relationship between reported costs and contracted services must be clearly and adequately documented. Adequate documentation consists of all materials necessary to demonstrate the relationship of personnel, supplies, and services to the provision of contracted client care or the relationship of the central office to the individual service delivery entity level. These materials may include, but are not limited to, accounting records, invoices, organizational charts, functional job descriptions, other written statements, and direct interviews with staff, as deemed necessary by HHSC auditors to perform required tests of reasonableness, necessity, and allowability.

(i) - (iii) (No change.)

(iv) To substantiate the allowable cost of leasing a luxury vehicle as defined in §355.103(b)(7)(C)(i) of this title, the provider must obtain at the time of the lease a separate quotation establishing the monthly lease costs for the base amount allowable for cost-reporting purposes as specified in §355.103(b)(7)(C)(i) of this title. [~~If the lease of the luxury vehicle occurred prior to January 1, 1997, then the provider must obtain the separate quotation prior to submitting its 1997 cost report in order for the allowable costs to be reported on the cost report.~~] Without adequate documentation to verify the allowable lease costs of the luxury vehicle, the reported costs shall be disallowed.

(v) - (xi) (No change.)

(xii) Regarding all forms of compensation, providers must maintain documentation for each employee which clearly identifies each compensation component, including regular pay, overtime pay, incentive pay, mileage reimbursements, bonuses, sick leave, vacation, other paid leave, deferred compensation, retirement contributions, provider-paid instructional courses, health insurance, disability insurance, life insurance, and any other form of compensation. Types of documentation would include insurance policies; provider benefit policies; records showing paid leave accrued and taken; documentation to support hours (regular and overtime) worked and wages paid; and mileage logs or other documentation to support mileage reimbursements and travel allowances. For accrued benefits, the documentation must clearly identify the period of the accrual. For example, if an employee accrues two weeks of vacation during 20x1 and receives the corresponding vacation pay during 20x3, that employee's compensation documentation for 20x3 should clearly indicate that the vacation pay received had been accrued during 20x1.

(I) For staff required to maintain continuous daily time sheets as per §355.102(j) of this title and subclause (II) of this clause, the daily timesheet must document, for each day, the staff member's start time, stop time, total hours worked, and the actual time worked (in increments of 30 minutes or less) providing direct services for the provider, the actual time worked performing other functions, and paid time off. The employee must sign each timesheet. The employee's supervisor must sign the timesheets each payroll period or at least monthly. Work schedules are unacceptable documentation for staff whose duties include multiple direct service types, both direct and indirect service component types, and both direct hands-on support and first level supervision of direct care workers.

(II) For the Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services and Texas Home Living programs, staff required to maintain continuous daily timesheets include staff whose duties include multiple direct service types, both direct and indirect service component types and/or both direct hands-on support and first-level supervision of direct care workers.

(xiii) - (xx) (No change.)

(3) (No change.)

(4) Requirements for cost report completion.

(A) A completed cost report must:

(i) - (vi) (No change.)

(vii) contain a copy of the state-issued cost report training certificate[~~, beginning with the 1997 cost report for DHS contracted providers and beginning with the 2004 cost report for TDMHMR contracted providers~~].

(B) Providers are required to report amounts on the appropriate line items of the cost report pursuant to guidelines established in the methodology rules, cost report instructions, and/or policy clarifications. Refer to program-specific reimbursement methodology rules, cost report instructions, and/or policy clarifications for guidelines used to determine placement of amounts on cost report line items.

(i) (No change.)

~~*(ii)* For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, placement on the cost report of an amount, which was determined to be inaccurately placed, constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title.~~

(ii) [~~(iii)~~] For all other programs, placement on the cost report of an amount, which was determined to be inaccurately placed, constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title.

(C) A completed cost report must be filed by the cost report due date.

(i) (No change.)

~~*(ii)* For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to file a completed cost report by the cost report due date constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title.~~

(ii) [~~(iii)~~] For all other programs, failure to file a completed cost report by the cost report due date constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title.

(D) (No change.)

(5) Cost report year. A [~~Effective for reporting periods beginning on September 1, 2001 and thereafter, a~~] provider's cost report year must coincide with the provider's fiscal year as used by the provider for reports to the Internal Revenue Service (IRS) or with the state of Texas' fiscal year, which begins September 1 and ends August 31.

(A) - (B) (No change.)

(6) (No change.)

(c) - (e) (No change.)

(f) Cost of out-of-state audits. As specified in §355.106 of this title (relating to Basic Objectives and Criteria for Audit and Desk Review of Cost Reports), HHSC conducts desk reviews of all cost reports not selected for field audit. HHSC also conducts field audits of provider records and cost reports. Although the number of field audits performed each year may vary, HHSC seeks to maximize the number of field audited cost reports available for use in its cost projections. Whenever possible, all the records necessary to verify information submitted to HHSC on cost reports, including related party transactions and other business activities engaged in by the provider, must be accessible to HHSC audit staff within the state of Texas within fifteen working days of field audit or desk review notification. When records are not available to HHSC audit staff within the state of Texas, the provider must pay the actual costs for HHSC staff to travel and review the records out-of-state. HHSC must be reimbursed for these costs within 60 days of the request for payment.

(1) (No change.)

~~[(2) For Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services, Service Coordination/Targeted Case Management, Rehabilitative Services, and Texas Home Living programs, failure to reimburse HHSC for these costs within 60 days of the date of the request for payment constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title.]~~

(2) [~~(3)~~] For all other programs, failure to reimburse HHSC for these costs within 60 days of the request for payment constitutes an administrative contract violation. In the case of an administrative contract violation, procedural guidelines and informal reconsideration and/or appeal processes are specified in §355.111 of this title.

(g) - (h) (No change.)

(i) Limits on related-party salaries, wages and/or benefits. HHSC may place upper limits or caps on related-party salaries, wages, and/or benefits as follows:

(1) For related-party administrators and directors, the upper limit for salaries and wages is equal to the 90th percentile in the array of all non-related party annualized salaries, wages and/or benefits as reported by all contracted providers within a program. In addition, the hourly wage and/or benefits for related-party administrators and directors is limited to the annualized upper limit for related-party administrators and directors divided by 2,080.

(2) For related-party assistant administrators and assistant directors, the upper limit for salaries and wages is equal to the 90th percentile in the array of all non-related party annualized salaries, wages and/or benefits as reported by all contracted providers within a program. In addition, the hourly wage and/or benefits for related-party assistant administrators and assistant directors is limited to the annualized upper limit for related-party assistant administrators and assistant directors divided by 2,080.

(3) For owners, partners, and stockholders (when the owner, partner, or stockholder is performing contract level administrative functions but is not the administrator, director, assistant administrator or assistant director), the upper limits for salaries and wages are equal to the upper limits for related-party administrators and directors.

(4) For all other staff types:

(A) For the Intermediate Care Facilities for Persons with Mental Retardation, Home and Community-based Services and Texas Home Living programs, related-party limitations are specified in §355.457 of this title (relating to Fiscal Accountability) and §355.722 of this title (relating to Reporting Costs by Home and Community-based Services (HCS) Providers).

(B) For all other programs, related-party salaries, wages and/or benefits are limited to reasonable and necessary costs as described in §355.102 of this title.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802065
Steve Aragón
General Counsel
Texas Health and Human Services Commission
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 424-6576

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TITLE 7. BANKING AND SECURITIES

PART 2. TEXAS DEPARTMENT OF BANKING

CHAPTER 15. CORPORATE ACTIVITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes new §15.9, concerning corporate filings after January 1, 2010; §15.10, concerning protested applications, §15.11, concerning hearings on applications; and §15.12, concerning waiver of requirements. The commission also proposes to amend §15.6, concerning applications for bank charter: notices to applicants; application processing times; appeals; and §15.8, concerning corporate filings. Finally, the commission proposes to repeal §15.9, concerning waiver of requirements, and §15.112, concerning waiver of requirements.

The new and amended rules are proposed to implement legislative changes resulting from the passage of HB 1962 and HB 2754, 80th Texas Legislature. The new and amended rules concern the method for protesting bank charter applications, the Banking Commissioner's (commissioner) discretion to convene a hearing in regard to bank charter applications, and the filing of corporate documents under the Texas Business Corporations Act (TBCA) or the Texas Business Organizations Code (TBOC).

Chapter 15, Subchapter A (§§15.1 - 15.9), implements Finance Code §§32.001 - 32.008 by setting out details regarding filing fees, corporate filings, and processing applications for bank charters.

The proposed amendment to §15.6 arises from that part of HB 2754 which was codified as Finance Code §32.005. Section 15.6(b) specifies that the department will notify the applicant of any protest. Section 15.6(c) is amended to clarify that the commissioner may convene a hearing whether or not a protest is filed, and that if the commissioner does so, the 180 day deadline for acting on an application does not apply. Section 15.6(c) is also amended to refer the reader to new §15.10, which governs procedures for protests.

The proposed amendment to §15.8(a) arises from the legislature's enactment of the Texas Business Organizations Code (TBOC) in 2003. The TBOC reorganized corporate structure and became effective January 1, 2006. In 2007, the legislature passed HB 1962, part of which is codified as Finance Code §32.008. Finance Code §32.008(a) makes the TBOC generally applicable to banking associations. Finance Code §32.008(d) states that, until January 1, 2010, a bank organized before January 1, 2006 can choose to be governed by the former law, the Texas Business Corporations Act (TBCA). Therefore, §15.8(a) is amended to clarify that, until January 1, 2010, banks organized before January 1, 2006 may file corporate documents proper under the TBCA.

The proposed amendment to §15.8(d) is authorized by Finance Code §201.103 and clarifies that a bank may file a statement with the secretary of state regarding the appointment, change or cancellation of an appointment of an agent to receive process.

Existing §15.9, concerning waiver of requirements, is proposed for repeal to make way for new §15.9. The content of existing §15.9 will be moved to new §15.12.

Proposed new §15.9, like §15.8, arises from the legislature's enactment of the TBOC in 2003. As stated above, Finance Code §32.008(a) makes the TBOC generally applicable to banking associations. After January 1, 2010, all state banks will be governed by the TBOC. Therefore, §15.9 follows the format of §15.8 and specifies the type of filings a state bank may make in compliance with the TBOC and whether those filings should be made with the secretary of state or the commissioner.

Proposed new §15.10 details the procedures for handling protests of applications of new bank charters. These procedures were revised by the legislature in HB 2754 and are codified as Finance Code §32.005(a) and (b).

Proposed new §15.11 details procedures for requesting hearings, clarifies that the commissioner has discretion whether or not to convene a hearing, and states how a hearing shall be conducted. These procedures were revised by the legislature in HB 2754 and are codified as Finance Code §32.005(c).

Proposed new §15.12 was formerly numbered §15.9. The text has been moved to remain the last section of Subchapter A for better organization.

Existing §15.112, concerning waiver of requirements is proposed for repeal because proposed new §15.12 covers the subject matter of existing §15.112 and therefore existing §15.112 is unnecessary.

Lynda Drake, Director of Corporate Activities, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rules.

Ms. Drake also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules is that the statutory procedures for protesting bank charter applications are clearly set out in the rules, the rules clearly explain the statutory grant of discretion to the commissioner regarding whether or not to convene a hearing on bank charter applications, and the rules specify what corporate filings to make before and after January 1, 2010.

For each year of the first five years that the rule will be in effect, there will be no economic costs to persons required to comply with the rule as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed new sections, repeals, and amendments must be submitted no later than 5:00 p.m. on the 30th day after the date of publication of this notice. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

7 TAC §§15.6, 15.8 - 15.12

The amendments and new sections are proposed under Finance Code §11.301, which provides that the commission may adopt banking rules as provided by Finance Code §31.003, under Finance Code §31.003(a), which provides that the commission may adopt rules to accomplish the purposes of the banking statutes, including rules necessary or reasonable to implement and clarify banking statutes and to facilitate the fair hearing and adjudication of matters before the commissioner, and under Finance Code §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 32 of the Finance Code and permitting a state bank to elect to be governed by the provisions of the TBOC to the extent not inconsistent with Subtitle A of Title 3 of the Finance Code or the proper business of a state bank.

Finance Code, §32.005 and §32.008 are affected by the proposed new and amended sections.

§15.6. Applications for Bank Charter: Notices to Applicants; Application Processing Times; Appeals.

(a) (No change.)

(b) Notice to applicant. The banking commissioner shall issue a written notice as required by §15.4 of this title (relating to Required Information and Abandoned Filings) informing the applicant either that all filing fees have been paid and the application is complete and accepted for filing, or that the application is deficient and specific additional information is required. If a protest is timely filed, the department will notify the applicant of the protest.

(c) Action on applications. If an application is not protested and if the banking commissioner has not ordered a hearing, the [~~The~~] banking commissioner shall approve or deny an application for a state bank charter or an application for conversion of a financial institution to a state bank on or before the 180th day after the date the application is accepted for filing, unless extended by written agreement between the

applicant and the banking commissioner[~~; provided that, if the application is protested, the banking commissioner shall convene a hearing on or before the 90th day after the date the protest is received and shall render a decision in accordance with Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rule-makings)~~]. If the application is protested, the application will be acted on in accordance with §15.10 of this title (relating to Protested Applications).

(d) - (e) (No change.)

§15.8. Corporate Filings before January 1, 2010.

(a) This section is applicable to all state banks organized before January 1, 2006, unless the state bank has elected to be governed by the provisions of the Texas Business Organizations Code to the extent not inconsistent with Title 3, Subtitle A of the Texas Finance Code. State banks that elect to be governed by the provisions of the Texas Business Organizations Code shall comply with the provisions of §15.9 of this title (relating to Corporate Filings after January 1, 2010).

(b) [~~(a)~~] In accordance with the applicable provisions of the Finance Code, Title 3, Subtitle A or G, the following corporate forms regarding a state bank, along with the applicable filing fees, must be filed with the banking commissioner:

(1) articles of correction as authorized by Texas Civil Statutes, Article 1302-7.02;

(2) articles of amendment under the Finance Code, §32.101;

(3) restated articles of association under the Finance Code, §32.101;

(4) restated articles of association with amendments under the Finance Code, §32.101;

(5) articles of merger under the Finance Code, §32.301 et seq, as supplemented by the Texas Business Corporation Act (TBCA), Article 5.04;

(6) articles of share exchange under TBCA, Article 5.02;

(7) statements regarding delayed effective condition under TBCA, Article 10.03;

(8) establishment of a series of shares by the board of directors under the Finance Code, §32.102;

(9) statement regarding a restriction on the transfer of shares under TBCA, Article 2.22(E); and

(10) abandonment of a merger or share exchange prior to its effective date under TBCA, Article 5.03(I).

(c) [~~(b)~~] For purposes of corporate filings with the banking commissioner under subsection (b) [~~(a)~~] of this section, state banks may utilize a modified version of forms promulgated by the secretary of state if the banking commissioner or the finance commission has not promulgated an appropriate corporate form; however, the banking commissioner may require the submission of additional information. The modified corporate forms must:

(1) specifically reference the applicable provisions of the Finance Code;

(2) change references from "corporation" to "association"; and

(3) change the references to "stated capital" and similar terms defined in the TBCA to an appropriate reference to terms defined in the Finance Code.

(d) [~~(c)~~] In accordance with the applicable provisions of the TBCA, a state bank may file the following corporate forms with the secretary of state as instructed in the TBCA:

(1) name registrations under TBCA, Article 2.07; [~~and~~]

(2) assumed name certificates under TBCA, Article 2.05; [~~.~~]

(3) a statement appointing an agent authorized to receive service of process under Finance Code §201.103;

(4) an amendment to a statement appointing an agent to receive service of process under Finance Code §201.103; and

(5) a cancellation of the appointment of an agent to receive service of process under Finance Code §201.103.

(e) [~~(d)~~] The following corporate forms are inapplicable to state banks and are not required to be filed by a state bank with either the secretary of state or the banking commissioner:

(1) changes of registered office or agent under TBCA, Article 2.10 or Article 2.10-1;

(2) name reservations under TBCA, Article 2.06;

(3) applications for reinstatement under TBCA, Article 10.01;

(4) articles of dissolution under TBCA, Article 6.06; and

(5) revocation of dissolution under TBCA, Article 6.05.

§15.9. Corporate Filings after January 1, 2010.

(a) This section is applicable to:

(1) all state banks organized after January 1, 2006;

(2) all state banks organized before January 1, 2006 that have elected to be governed by the provisions of the Texas Business Organizations Code to the extent not inconsistent with Title 3, Subtitle A of the Texas Finance Code; and

(3) effective, January 1, 2010, all state banks no matter what their date of organization.

(b) In accordance with the applicable provisions of the Finance Code, Title 3, Subtitle A or G, the following corporate forms regarding a state bank, along with the applicable filing fees, must be filed with the banking commissioner:

(1) a certificate of correction as authorized by Texas Business Organizations Code (TBOC), §4.101;

(2) articles of amendment under the Finance Code, §32.101;

(3) restated, or, amended and restated, articles of association under the Finance Code, §32.101, and TBOC §3.059 and §21.052;

(4) articles of merger under the Finance Code, §32.301 et seq, as supplemented by the TBOC §10.151;

(5) certificate of exchange under TBOC, §10.151;

(6) statement of event or fact pursuant to TBOC §4.055;

(7) establishment of a series of shares by the board of directors under the Finance Code, §32.102, as supplemented by TBOC §21.155 and §21.156;

(8) statement regarding a restriction on the transfer of shares under TBOC, §21.212; and

(9) abandonment of a merger or interest exchange prior to its effective date under TBOC §4.057.

(c) For purposes of corporate filings with the banking commissioner under subsection (b) of this section, state banks may utilize a modified version of forms promulgated by the secretary of state if the banking commissioner or the finance commission has not promulgated an appropriate corporate form; however, the banking commissioner may require the submission of additional information. The modified corporate forms must:

(1) specifically reference the applicable provisions of the Finance Code;

(2) change references from "corporation" to "association"; and

(3) change the references to "stated capital" and similar terms defined in the TBOC to an appropriate reference to terms defined in the Finance Code.

(d) In accordance with the applicable provisions of the Finance Code and the TBOC, a state bank may file the following corporate forms with the secretary of state as instructed in the Finance Code or the TBOC:

(1) name registrations under TBOC §§5.151 - 5.155;

(2) assumed name certificates under TBOC §5.051;

(3) a statement appointing an agent authorized to receive service of process under Finance Code §201.103;

(4) an amendment to a statement appointing an agent to receive service of process under Finance Code §201.103; and

(5) a cancellation of the appointment of an agent to receive service of process under Finance Code §201.103.

(e) The following corporate forms are inapplicable to state banks and are not required to be filed by a state bank with either the secretary of state or the banking commissioner:

(1) changes of registered office or agent under TBOC §5.202 or §5.203;

(2) name reservations under TBOC §5.101;

(3) certificate of termination under TBOC §11.101; and

(4) certificate of reinstatement under TBOC §11.202.

§15.10. Protested Applications.

(a) A protest of a charter application must be received by the department before the 15th day after the date the organizers publish notice and must be accompanied by any fee required by §15.5(b) of this title (relating to Public Notice). If the protest is untimely, the department will return all fees and deposits to the protesting party. If the protest is timely, the department shall notify the applicant of the protest and mail or deliver a complete copy of the nonconfidential sections of the charter application to the protesting party before the 15th day after the later of the date of receipt of the protest or receipt of the charter application.

(b) A protesting party must file a detailed protest responding to each contested statement in the nonconfidential portion of the application not later than the 20th day after the date the protesting party receives the application from the department. The protesting party must relate each statement and response in his protest to the standards for approval set forth in Finance Code §32.003(b).

(c) The applicant must file a written reply to the protesting party's detailed response on or before the 10th day after the date the response is filed.

(d) The protesting party's response and the applicant's reply must be in the form and must be served as required by Finance Code §32.005(b). Any comment received by the department and any reply of the applicant to the comment shall be made available to the protesting party.

§15.11. Hearings on Applications.

(a) The banking commissioner may not be compelled to hold a hearing before granting or denying the charter application. The banking commissioner may grant a hearing at the request of an applicant or a protesting party. The banking commissioner may order a hearing without any party having requested one.

(b) A party requesting a hearing must indicate with specificity the issues involved that cannot be determined on the basis of the record complied under §15.10(b) - (d) of this title (relating to Protested Applications) and why the issues cannot be determined.

(c) If the banking commissioner sets a hearing, the banking commissioner shall conduct a public hearing and one or more prehearing conferences as the banking commissioner considers advisable and consistent with applicable law. The banking commissioner shall also allow the parties to undertake such discovery as the banking commissioner considers advisable and consistent with applicable law, except that the banking commissioner may not permit discovery of confidential information in the charter application or the investigation report.

§15.12. Waiver of Requirements.

The banking commissioner in the exercise of discretion may waive or modify any requirement imposed by this chapter, unless specifically required by statute.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802037
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: June 20, 2008
For further information, please call: (512) 475-1300

7 TAC §15.9

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of §15.9 is proposed under Finance Code §11.301, which provides that the commission may adopt banking rules as provided by Finance Code §31.003, under Finance Code §31.003(a), which provides that the commission may adopt rules to accomplish the purposes of the banking statutes, including rules necessary or reasonable to implement and clarify banking statutes and to facilitate the fair hearing and adjudication of matters before the commissioner, and under Finance Code §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 32 of the Finance Code.

Finance Code §32.005 and §32.008 are affected by the proposed repeal.

§15.9. Waiver of Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802038
A. Kaylene Ray
General Counsel
Texas Department of Banking
Proposed date of adoption: June 20, 2008
For further information, please call: (512) 475-1300

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SUBCHAPTER F. APPLICATIONS FOR MERGER, CONVERSION, AND PURCHASE OR SALE OF ASSETS

7 TAC §15.112

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of §15.112 is proposed under Finance Code §11.301, which provides that the commission may adopt banking rules as provided by Finance Code §31.003, under Finance Code §31.003(a), which provides that the commission may adopt rules to accomplish the purposes of the banking statutes, including rules necessary or reasonable to implement and clarify banking statutes and to facilitate the fair hearing and adjudication of matters before the commissioner, and under Finance Code §32.008, which authorizes the commission to adopt rules to limit or refine the applicability of general corporate laws to a state bank or to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 32 of the Finance Code.

Finance Code §32.005 and §32.008 are affected by the proposed repeal.

§15.112. Waiver of Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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A. Kaylene Ray
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1300

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CHAPTER 21. TRUST COMPANY CORPORATE ACTIVITIES

The Finance Commission of Texas (the commission), on behalf of the Texas Department of Banking (the department), proposes new §21.9, concerning corporate filings after January 1, 2010; §21.10, concerning protested applications; §21.11, concerning hearings on applications; and §21.12, concerning waiver of requirements. The commission also proposes to amend §21.6, concerning applications for trust charter: notices to applicants; application processing times; appeals; §21.8, concerning corporate filings; §21.63, concerning expedited filings; and, §21.91, concerning acquisition and retention of shares as treasury stock. Finally, the commission proposes to repeal §21.9, concerning waiver of requirements.

The new and amended rules are proposed to implement legislative changes resulting from the passage of HB 1962 and HB 2754. The new and amended rules concern the method for protesting trust charter applications, the Banking Commissioner's (commissioner) discretion to convene a hearing in regard to trust charter applications, and the filing of corporate documents under the Texas Business Corporations Act (TBCA) or the Texas Business Organizations Code (TBOC).

Chapter 21, Subchapter A (§§21.1 - 21.9), implements Finance Code §§182.001 - 182.009 by setting out details regarding filing fees, corporate filings, and processing applications for trust charters.

The proposed amendment to §21.6 arises from the part of HB 2754 which was codified as Finance Code §182.005. Section 21.6(b) specifies that the department will notify the applicant of any protest. Section 21.6(c) is amended to clarify that the commissioner may convene a hearing whether or not a protest is filed, and that if the commissioner does so, the 180 day deadline for acting on an application does not apply. Section 21.6(c) is also amended to refer the reader to new §21.10, which governs procedures for protests.

The proposed amendment to §21.8(a) arises from the legislature's enactment of the Texas Business Organizations Code (TBOC) in 2003. The TBOC reorganized corporate structure and became effective January 1, 2006. In 2007, the legislature passed HB 1962, part of which is codified as Finance Code §182.009. Finance Code §182.009(a) makes the TBOC generally applicable to trust associations. Finance Code §182.009(d) states that, until January 1, 2010, a state trust company organized before January 1, 2006 can choose to be governed by the former law, the Texas Business Corporations Act (TBCA). Therefore, §21.8(a) is amended to clarify that, until January 1, 2010, state trust companies organized before January 1, 2006 that made this election may file corporate documents in accordance with the TBCA.

The proposed amendment to §21.8(d) is authorized by Finance Code §201.103 and clarifies that a trust company may file a statement with the secretary of state regarding the appointment, change or cancellation of an appointment of an agent to receive process.

For organizational purposes, existing §21.9, concerning waiver of requirements, is proposed for repeal to make way for new §21.9. The content of existing §21.9 will be moved to new §21.12.

Proposed new §21.9, like §21.8, arises from the legislature's enactment of the TBOC in 2003. As stated above, Finance Code §182.009(a) makes the TBOC generally applicable to trust associations. After January 1, 2010, all state trust companies will be governed by the TBOC regardless of the date of their organiza-

tion. Therefore, §21.9 follows the format of §21.8 and specifies the type of filings required by a state trust company to be in compliance with the TBOC and whether those filings should be made with the secretary of state or the commissioner.

Proposed new §21.10 details the procedures for handling protests of applications of new trust company charters, which were revised by the legislature in HB 2754 and which are codified as Finance Code §182.005(a) and (b).

Proposed new §21.11 details procedures for requesting hearings, clarifies that the commissioner has discretion whether or not to convene a hearing, and states how a hearing shall be conducted. These procedures were revised by the legislature in HB 2754 and are codified as Finance Code §182.005(c).

Proposed new §21.12 was formerly numbered §21.9. The text has been moved to remain the last section of Subchapter A.

The proposed amendments to §21.63 and §21.91 are to correct a typographical error and to delete a reference to a repealed rule, respectively.

Lynda Drake, Director of Corporate Activities, Texas Department of Banking, has determined that for the first five-year period the proposed rules are in effect, there will be no fiscal implications for state government or for local government as a result of enforcing or administering the rules.

Ms. Drake also has determined that, for each year of the first five years the rules as proposed are in effect, the public benefit anticipated as a result of enforcing the rules is that the statutory procedures for protesting trust charter applications are clearly set out in the rules, the rules clearly explain the statutory grant of discretion to the commissioner regarding whether or not to convene a hearing on trust charter applications, and the rules specify what corporate filings to make before and after January 1, 2010.

For each year of the first five years that the rules will be in effect, there will be no economic costs to persons required to comply with the rules as proposed.

There will be no adverse economic effect on small businesses or micro-businesses. There will be no difference in the cost of compliance for small businesses as compared to large businesses.

To be considered, comments on the proposed new sections, repeals and amendments must be submitted no later than 5:00 p.m. on the 30th day after the date of publication of this notice. Comments should be addressed to General Counsel, Texas Department of Banking, Legal Division, 2601 North Lamar Boulevard, Suite 300, Austin, Texas 78705-4294. Comments may also be submitted by email to legal@banking.state.tx.us.

SUBCHAPTER A. FEES AND OTHER PROVISIONS OF GENERAL APPLICABILITY

7 TAC §§21.6, 21.8 - 21.12

The amendments and new sections are proposed under Finance Code, §181.003(a), which provides that the commission may adopt rules to accomplish the purposes of the Subtitle F, Trust Companies, including rules necessary or reasonable to implement and clarify Subtitle F and to facilitate the fair hearing and adjudication of matters before the commissioner, and under Finance Code §182.009, which authorizes the commission to adopt rules to alter or supplement the procedures and requirements of those laws applicable to actions taken under chapter 182 of the Finance Code and permits a state trust company to elect to be governed by the provisions of the TBOC to the extent not inconsistent with subtitle F of Title 3 of the Finance Code or the proper business of a state trust company.

Finance Code §182.005 and §182.009 are affected by the proposed new and amended sections.

§21.6. Applications for Trust Charter: Notices to Applicants; Application Processing Times; Appeals.

(a) (No change.)

(b) Notice to applicant. The banking commissioner shall issue a written notice as required by §21.4 of this title (relating to Required Information and Abandoned Filings) informing the applicant either that all filing fees have been paid and the application is complete and accepted for filing, or that the application is deficient and specific additional information is required. If a protest is timely filed, the department will notify the applicant of the protest.

(c) Action on applications. If an application is not protested and if the banking commissioner has not ordered a hearing, the [~~The~~] banking commissioner shall approve or deny an application for a trust company charter on or before the 180th day after the date the application is accepted for filing, unless extended by written agreement between the applicant and the banking commissioner. If [~~; provided that, if~~] the application is protested, the application will be acted on in accordance with §21.10 of this title (relating to Protested Applications) [~~banking commissioner shall convene a hearing on or before the 90th day after the date the protest is received and shall render a decision in accordance with Chapter 9 of this title (relating to Rules of Procedure for Contested Case Hearings, Appeals, and Rulemakings)~~].

(d) - (e) (No change.)

§21.8. Corporate Filings before January 1, 2010.

(a) This section is applicable to all state trust companies organized before January 1, 2006, unless the state trust company has elected to be governed by the provisions of the Texas Business Organizations Code to the extent not inconsistent with the Trust Company Act. State trust companies that elect to be governed by the provisions of the Texas Business Organizations Code shall comply with the provisions of §21.9 of this title (relating to Corporate Filings after January 1, 2010).

(b) [~~(a)~~] In accordance with the applicable provisions of the Trust Company Act, the following corporate forms regarding a trust company, along with the applicable filing fees, must be filed with the banking commissioner:

(1) articles of correction as authorized by Texas Civil Statutes, Article 1302-7.02;

(2) articles of amendment under Finance Code, §182.101;

(3) restated articles of association under the Finance Code, §182.101;

(4) restated articles of association with amendments under Finance Code, §182.101;

(5) articles of merger under Finance Code, §§182.301 et seq, as supplemented by the Texas Business Corporation Act (TBCA), Article 5.04;

(6) articles of share exchange under TBCA, Article 5.02;

(7) statements regarding delayed effective condition under TBCA, Article 10.03;

(8) establishment of a series of shares by the board of directors under Finance Code, §182.101;

(9) statement regarding a restriction on the transfer of shares under TBCA, Article 2.22(E);

(10) statement of cancellation of redeemable shares under TBCA, Article 4.10(B);

(11) statement of cancellation of treasury shares under TBCA, Article 4.11;

(12) statement regarding the reduction of capital and surplus under TBCA, Article 4.12; and

(13) abandonment of a merger or share exchange prior to its effective date under TBCA, Article 5.03(I).

(c) [~~(b)~~] For purposes of corporate filings with the banking commissioner under subsection (b) [~~(a)~~] of this section, trust companies may utilize a modified version of forms promulgated by the secretary of state if the banking commissioner or the finance commission has not promulgated an appropriate corporate form; however, the banking commissioner may require the submission of additional information. The modified corporate forms must:

(1) specifically reference the applicable provisions of the Trust Company Act;

(2) change references from "corporation" to "association;" and

(3) change the references to "stated capital" and similar terms defined in the TBCA to an appropriate reference to terms defined in the Trust Company Act.

(d) [~~(c)~~] In accordance with the applicable provisions of the TBCA, a trust company may file the following corporate forms with the secretary of state as instructed in the TBCA:

(1) name registrations under TBCA, Article 2.07; [~~and~~]

(2) assumed name certificates under TBCA, Article 2.05;[~~.~~]

(3) a statement appointing an agent authorized to receive service of process under Finance Code §201.103;

(4) an amendment to a statement appointing an agent to receive service of process under Finance Code §201.103; and

(5) a cancellation of the appointment of an agent to receive service of process under Finance Code §201.103.

(e) [~~(d)~~] The following corporate forms are inapplicable to trust companies and are not required to be filed by a trust company with either the secretary of state or the banking commissioner:

(1) changes of registered office or agent under TBCA, Article 2.10 or Article 2.10-1;

(2) name reservations under TBCA, Article 2.06;

(3) applications for reinstatement under TBCA, Article 10.01;

(4) articles of dissolution under TBCA, Article 6.06; and

(5) revocation of dissolution under TBCA, Article 6.05.

§21.9. Corporate Filings after January 1, 2010.

(a) This section is applicable to:

(1) all state trust companies organized after January 1, 2006;

(2) all state trust companies organized before January 1, 2006 that have elected to be governed by the provisions of the Texas Business Organizations Code to the extent not inconsistent with the Trust Company Act; and

(3) effective, January 1, 2010, all state trust companies no matter what their date of organization.

(b) In accordance with the applicable provisions of the Trust Company Act, the following corporate forms regarding a state trust company, along with the applicable filing fees, must be filed with the banking commissioner:

(1) a certificate of correction as authorized by Texas Business Organizations Code (TBOC), §4.101;

(2) articles of amendment under the Finance Code, §32.101;

(3) restated, or, amended and restated, articles of association under the Finance Code, §32.101, and TBOC §3.059 and §21.052;

(4) articles of merger under the Finance Code, §32.301 et seq, as supplemented by the TBOC §10.151;

(5) certificate of exchange under TBOC, §10.151;

(6) statement of event or fact pursuant to TBOC §4.055;

(7) establishment of a series of shares by the board of directors under the Finance Code, §32.102, as supplemented by TBOC §21.155 and §21.156;

(8) statement regarding a restriction on the transfer of shares under TBOC, §21.212; and

(9) abandonment of a merger or interest exchange prior to its effective date under TBOC §4.057.

(c) For purposes of corporate filings with the banking commissioner under subsection (b) of this section, state trust companies may utilize a modified version of forms promulgated by the secretary of state if the banking commissioner or the finance commission has not promulgated an appropriate corporate form; however, the banking commissioner may require the submission of additional information. The modified corporate forms must:

(1) specifically reference the applicable provisions of the Finance Code;

(2) change references from "corporation" to "association"; and

(3) change the references to "stated capital" and similar terms defined in the TBOC to an appropriate reference to terms defined in the Finance Code.

(d) In accordance with the applicable provisions of the Finance Code and the TBOC, a state trust company may file the following corporate forms with the secretary of state as instructed in the Finance Code or the TBOC:

(1) name registrations under TBOC §§5.151 - 5.155;

(2) assumed name certificates under TBOC §5.051;

(3) a statement appointing an agent authorized to receive service of process under Finance Code §201.103;

(4) an amendment to a statement appointing an agent to receive service of process under Finance Code §201.103; and

(5) a cancellation of the appointment of an agent to receive service of process under Finance Code §201.103.

(e) The following corporate forms are inapplicable to state trust companies and are not required to be filed by a state trust company with either the secretary of state or the banking commissioner:

(1) changes of registered office or agent under TBOC §5.202 or §5.203;

(2) name reservations under TBOC §5.101;

(3) certificate of termination under TBOC §11.101; and

(4) certificate of reinstatement under TBOC §11.202.

§21.10. Protested Applications.

(a) A protest of a charter application must be received by the department before the 15th day after the date the organizers publish notice and must be accompanied by any fee required by §21.5(b) of this title (relating to Public Notice). If the protest is untimely, the department will return all fees and deposits to the protesting party. If the protest is timely, the department shall notify the applicant of the protest and mail or deliver a complete copy of the nonconfidential sections of the charter application to the protesting party before the 15th day after the later of the date of receipt of the protest or receipt of the charter application.

(b) A protesting party must file a detailed protest responding to each contested statement in the nonconfidential portion of the application not later than the 20th day after the date the protesting party receives the application from the department. The protesting party must relate each statement and response in his protest to the standards for approval set forth in Finance Code §182.003(b).

(c) The applicant must file a written reply to the protesting party's detailed response on or before the 10th day after the date the response is filed.

(d) The protesting party's response and the applicant's reply must be in the form and must be served as required by Finance Code §182.005(b). Any comment received by the department and any reply of the applicant to the comment shall be made available to the protesting party.

§21.11. Hearings on Applications.

(a) The banking commissioner may not be compelled to hold a hearing before granting or denying the charter application. He may grant a hearing at the request of an applicant or a protesting party. He may order a hearing without any party having requested one.

(b) A party requesting a hearing must indicate with specificity the issues involved that cannot be determined on the basis of the record complied under §21.10(b) - (d) of this title (relating to Protested Applications) and why the issues cannot be determined.

(c) If the banking commissioner sets a hearing, he shall conduct a public hearing and one or more prehearing conferences as he considers advisable and consistent with applicable law. He shall also allow the parties to undertake such discovery as he considers advisable and consistent with applicable law, except that he may not permit discovery of confidential information in the charter application or the investigation report.

§21.12. Waiver of Requirements.

The banking commissioner in the exercise of discretion may waive or modify any requirement imposed by this chapter.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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A. Kaylene Ray
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1300

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7 TAC §21.9

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Texas Department of Banking or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The repeal of §21.9 is proposed under Finance Code §181.003, which provides that the commission may adopt rules to accomplish the purposes of the Subtitle F, Trust Companies, including rules necessary or reasonable to implement and clarify Subtitle F and to facilitate the fair hearing and adjudication of matters before the commissioner, and Finance Code §182.009, which provides that the commission may adopt rules to alter or supplement the procedures and requirements of the general corporate laws listed in §182.009 applicable to an action taken under Finance Code Chapter 182 by a state trust company.

Finance Code §182.005 and §182.009 are affected by the proposed repeal.

§21.9. Waiver of Requirements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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A. Kaylene Ray
General Counsel
Texas Department of Banking
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SUBCHAPTER F. APPLICATION FOR MERGER, CONVERSION, OR SALE OF ASSETS

7 TAC §21.63

The amendment to §21.63 is proposed under Finance Code, §181.003(a), which provides that the commission may adopt rules to accomplish the purposes of the Subtitle F, Trust Companies, including rules necessary or reasonable to implement and clarify Subtitle F and to facilitate the fair hearing and adjudication of matters before the commissioner.

Finance Code §182.301 to §182.405 are affected by the proposed amended section.

§21.63. Expedited Filings.

(a) - (d) (No change.)

(e) The banking commissioner shall approve or deny an expedited filing on or before a date that is 30 days after the date the expedited filing is accepted for filing pursuant to §21.4 of this title (relating to Required Information and Abandoned Filings). The banking commissioner may, in the exercise of discretion, before the expiration of

the period for decision, give the applicant written notice that the banking commissioner will convene a hearing to obtain evidence related to the application, and the decision will thereafter be made in accordance with §21.72 [~~§21.82~~] of this title (relating to Approval; Conditional Approval; Denial of Application; Hearings).

(f) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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A. Kaylene Ray
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1300

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SUBCHAPTER G. CHARTER AMENDMENTS AND CERTAIN CHANGES IN OUTSTANDING STOCK

7 TAC §21.91

The amendment to §21.91 is proposed under Finance Code, §181.003(a), which provides that the commission may adopt rules to accomplish the purposes of the Subtitle F, Trust Companies, including rules necessary or reasonable to implement and clarify Subtitle F and to facilitate the fair hearing and adjudication of matters before the commissioner.

Finance Code §§182.103, 184.101 and 184.102 are affected by the proposed amended section.

§21.91. Acquisition and Retention of Shares as Treasury Stock.

(a) - (c) (No change.)

(d) Disapproval. The banking commissioner may disapprove the proposed plan of acquisition if the banking commissioner concludes that the trust company's plan of acquisition:

(1) - (2) (No change.)

(3) may threaten the adequacy of the trust company's equity capital or its restricted capital, or could result in a trust company failing to maintain the minimum required level in restricted capital set forth in Finance Code, §182.103[~~, or §17.1(b) of this title~~]; or

(4) (No change.)

(e) - (h) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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A. Kaylene Ray
General Counsel
Texas Department of Banking
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For further information, please call: (512) 475-1300

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PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER B. INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §84.209

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the Office of Consumer Credit Commissioner or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (commission) proposes the repeal of 7 TAC §84.209, concerning Model Clauses. The commission has determined that this rule more effectively belongs in a different location within Chapter 84 in order to better track the organization of Texas Finance Code, Chapter 348. Therefore, this rule is being proposed for repeal and a new (relocated) rule is proposed elsewhere in this issue of the *Texas Register*.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the repeal as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the repeal.

Commissioner Pettijohn also has determined that for each year of the first five years the repeal as proposed will be in effect, the public benefit anticipated as a result of the repeal will be more logically organized and readily available rules for lenders and consumers. There is no anticipated cost to persons who are required to comply with the repeal as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the repeal as proposed.

Comments on the proposed repeal may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, or by e-mail to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed repeal is published in the *Texas Register*. At the conclusion of the 31st day after the proposed repeal is published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

The repeal is proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 authorizes the commission to adopt rules for the enforcement of the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the proposed repeal are contained in Texas Finance Code, Chapter 348.

§84.209. Model Clauses.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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TRD-200802035
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 936-7611

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SUBCHAPTER C. SALES FINANCE OPERATIONS

7 TAC §84.302

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the Office of Consumer Credit Commissioner or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Finance Commission of Texas (commission) proposes the repeal of 7 TAC §84.302, concerning Prepaid Maintenance Agreements. The commission has determined that this rule more effectively belongs in a different location within Chapter 84 in order to better track the organization of Texas Finance Code, Chapter 348. Therefore, this rule is being proposed for repeal and a new (relocated) rule is proposed elsewhere in this issue of the *Texas Register*.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the repeal as proposed will be in effect, there will be no fiscal implications for state or local government as a result of administering or enforcing the repeal.

Commissioner Pettijohn also has determined that for each year of the first five years the repeal as proposed will be in effect, the public benefit anticipated as a result of the repeal will be more logically organized and readily available rules for lenders and consumers. There is no anticipated cost to persons who are required to comply with the repeal as proposed. There will be no adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the repeal as proposed.

Comments on the proposed repeal may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207, or by e-mail to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed repeal is published in the *Texas Register*. At the conclusion of the 31st day after the proposed repeal is published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

The repeal is proposed under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 authorizes the commission to adopt rules for the enforcement of the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the proposed repeal are contained in Texas Finance Code, Chapter 348.

§84.302. Prepaid Maintenance Agreements.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7611

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SUBCHAPTER C. INSURANCE

7 TAC §§84.302 - 84.305, 84.307

The Finance Commission of Texas (commission) proposes new §§84.302 - 84.305 and §84.307, concerning Insurance, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner.

The new rules (§§84.302 - 84.305) contain new operational provisions regarding insurance. The purpose of the new operational rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process.

Section 84.307 (current §84.302) is being relocated and reorganized. The agency believes that the reorganization will benefit licensees in that this rule will be easier to find in a more logical location and order which better tracks the organization of Texas Finance Code, Chapter 348. The relocated rule is substantially similar to the rule pending repeal, as found in 7 TAC §84.302, concerning Prepaid Maintenance Agreements. The commission's proposed repeal of this section is published elsewhere in this issue of the *Texas Register*.

In reference to the relocated rule, the purpose of the rule tracks the original purpose language used when the rule was originally adopted. Please note that, aside from changes to section number references, the new rule contained in §84.307 is merely being relocated without changes.

The following paragraphs outline the individual purposes of each proposed rule. The relocated rule will be listed with its current location "(current §84.XXX)" listed after the proposed new section number.

Section 84.302 describes the basic requirements and types of credit insurance authorized to be sold in connection with retail installment sales contracts for motor vehicles. The rule is necessary to prescribe these types of insurance and require compliance with the applicable statutes contained in the Texas Insurance Code.

Section 84.303 outlines the required elements that must be included in a policy or certificate of insurance given to the retail buyer if a motor vehicle retail installment sales contract provides for the purchase of insurance by the retail buyer from the retail seller. This rule is necessary to prescribe the specific information required to be disclosed to the retail buyer and to provide for a reasonable time frame in which the information is to be disclosed.

Section 84.304 requires that if a retail buyer provides a holder with equivalent property insurance coverage that names the holder as a loss payee, the holder must cancel any equivalent property insurance.

Section 84.305 provides that if a holder arranges for collateral protection insurance and assesses a charge for the insurance to the retail buyer, the holder must comply with Texas Finance Code, Chapter 307.

Section 84.307 (current §84.302) outlines the methods of disclosure on a retail installment sales contract for prepaid maintenance agreements sold in connection with motor vehicles. Prepaid maintenance agreements that are required or otherwise included with the sale of a motor vehicle must be disclosed as a component of the cash price. Those agreements sold on a voluntary basis may be disclosed under two methods specified in the rule.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn has determined that for each year of the first five years the new operational rules are in effect the public benefit anticipated will be that the commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced. For §84.307 (relocated rule), Commissioner Pettijohn has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of the relocated rule will be enhanced compliance with the credit laws and consistency in credit contracts.

There is no anticipated cost to persons who are required to comply with the rules as proposed. There is no anticipated adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the rules as proposed.

Comments on the proposed new rules may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed rules are published in the *Texas Register*. At the conclusion of the 31st day after the proposed rules are published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

These new sections are proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

These rules affect Texas Finance Code, Chapter 348.

§84.302. Authorized Credit Insurance.

(a) Authorized credit insurance includes credit life, credit accident and health insurance, credit involuntary unemployment insurance, and dual-interest gap insurance.

(b) Credit life insurance, credit accident and health insurance, and involuntary unemployment insurance written in connection with a Texas Finance Code, Chapter 348 motor vehicle retail installment sales contract shall be decreasing term insurance.

(c) Credit life insurance and credit accident and health insurance must be written in compliance with Texas Insurance Code, Chapters 1131 and 1153, and any regulations issued by the Texas Department of Insurance under the authority of those provisions.

(d) Involuntary unemployment insurance must be written in compliance with Texas Insurance Code, Chapter 3501, and any regulations issued by the Texas Department of Insurance under the authority of that chapter.

(e) Dual-interest gap insurance, authorized by Texas Finance Code, §348.208(b)(4), must be written at rates and on forms set and filed in accordance with Texas Insurance Code, Chapters 2251 and 2301, and any regulations issued by the Texas Department of Insurance under the authority of those provisions.

(f) Credit insurance must be procured from an insurance company authorized to do business in this state. Surplus lines insurance companies are not authorized to offer credit insurance on a Chapter 348 motor vehicle retail installment sales contract.

(g) Debt cancellation, debt suspension, and gap waiver agreements are not credit insurance. Debt cancellation, debt suspension, and gap waiver agreements are not authorized to be sold or written with a Chapter 348 motor vehicle retail installment sales contract.

§84.303. Provision of Policy or Certificate.

If a Texas Finance Code, Chapter 348 motor vehicle retail installment sales contract provides for the purchase of insurance by the retail buyer from the retail seller, the retail seller must provide to the retail buyer, within 30 days of the date of the contract, a properly executed policy or certificate of insurance. The policy or certificate of insurance must clearly set forth:

(1) the amount of the premium;

(2) the kind of insurance provided;

(3) the coverage of the insurance; and

(4) all terms, including options, limitations, restrictions and conditions of the insurance that has been purchased.

§84.304. Evidence of Equivalent Insurance.

If a retail buyer provides a holder with evidence of property insurance coverage that names the holder as a loss payee and that is equivalent to insurance purchased through the holder, the holder must promptly cancel any equivalent property insurance or collateral protection insurance. The refund of any unearned insurance premium shall be applied to the balance of the contract or refunded to the retail buyer.

§84.305. Collateral Protection Insurance.

If a holder arranges for collateral protection insurance and assesses a charge for the insurance to the retail buyer, the holder must comply with the provisions of Texas Finance Code, Chapter 307.

§84.307. Prepaid Maintenance Agreements.

(a) If the prepaid maintenance agreement is required in connection with the sale of a motor vehicle, regardless of whether the sale is a cash sale or a credit sale, the charge for the prepaid maintenance agreement should be disclosed or otherwise included as a component of the cash price.

(b) If the prepaid maintenance agreement is offered as a voluntary purchase in connection with the credit sale of a motor vehicle, the prepaid maintenance agreement may be disclosed:

(1) as a component of the cash price; or

(2) as an itemized charge on the retail installment sales contract.

(c) At the time of the sale, the services covered by the prepaid maintenance agreement should be reasonably expected to be delivered during the term of the agreement.

(d) The agency may evaluate the assessed charge for a prepaid maintenance agreement. If the agency determines that the charge is excessive considering relevant factors, then the agency may consider the excessive amount as finance charge. One of the relevant factors the agency will consider is whether the assessed charge and sales representations between cash and credit transactions differ.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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SUBCHAPTER E. HOLDER'S RIGHTS, DUTIES, AND LIMITATIONS

7 TAC §§84.501, 84.503, 84.504

The Finance Commission of Texas (commission) proposes new §§84.501, 84.503, and 84.504, concerning Holder's Rights, Duties, and Limitations, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner.

The new rules contain new operational provisions regarding payoff statements, and collection practices and contacts. The purpose of the rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. The following paragraphs outline the individual purposes of each proposed rule.

Section 84.501 requires a holder to provide a retail buyer with a payoff statement on written request of the retail buyer. This provision is necessary to enable a retail buyer to prepay the debt at any time in accordance with Chapter 348. The rule also outlines the content of the payoff statement and what is considered to be a reasonable time in which to respond to an inquiry for a payoff statement for different types of accounts.

Section 84.503 addresses the allowable collection practices of motor vehicle sales finance licensees, including a prohibition on the use of any physical force or violence against any person or property.

Section 84.504 outlines who may be contacted regarding a debt subject to Texas Finance Code, Chapter 348, and when a licensee may communicate with a retail buyer. The rule limits the communication restrictions according to each particular retail buyer and that buyer's specific debt under a motor vehicle retail sales installment contract. The rule prohibits the use of any simulated legal process and the misrepresentation of the identity of the licensee.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn has determined that for each year of the first five years the new operational rules are in effect the public benefit anticipated will be that the commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced.

In reference to §84.501, while there are costs involved in providing payoff statements and statements of payments, the statutory requirement for holders to supply these statements has been in place for over a decade, as contained in Texas Finance Code, §348.405. Any costs related to payoff statements or statements of payments are imposed by the statute and are not a result of the proposed rule. The rule serves to provide clarification and guidance for both retail buyers and holders as to what should occur when a statement is requested.

Concerning §84.503 and §85.504, some training may be required by licensees with respect to these provisions on collection practices and collection contacts. Federal regulations, however, already require licensees to adhere to many of the basic requirements contained in these rules. Moreover, it is the agency's understanding that some licensees have similar practices concerning collections in order to limit exposure to potential litigation by retail buyers. The rules may even reduce that exposure by providing more specific guidelines for collection practices and collection contacts. It is the agency's estimation that any additional training required would be minimal (e.g., 30 minutes to orally review rules with employees) and at most, would result in a nominal cost to licensees.

There is no anticipated adverse economic effect on small or micro businesses. Aside from the potential costs outlined in the preceding paragraphs, there will be no effect on individuals required to comply with the rules as proposed.

Comments on the proposed new rules may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed rules are published in the *Texas Register*. At the conclusion of the 31st day after the proposed rules are published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

These new sections are proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

These rules affect Texas Finance Code, Chapter 348.

§84.501. Payoff Statement or Statement of Payments.

(a) Payoff statement. On the written request of the retail buyer or the buyer's designee, a holder must provide a payoff statement to the person making the request within a reasonable time.

(b) Statement of payments. On the written request of the retail buyer or the retail buyer's designee, a holder must provide a statement of the dates and amounts of payments and the total amount unpaid under the contract to the person making the request within a reasonable time.

(c) Delinquent accounts. A holder must provide the information required by this section even if at the time the inquiry is made the account is delinquent.

(d) Requesting statement. A holder may designate a location where the person requesting a payoff statement or statement of payments may submit a request for the statement. The designation may include a mailing address, physical address, telephone number, website address, email address, or other point of contact for submission of the request. The designated location must be reasonably accessible to the retail buyer or buyer's designee. The mailing address and telephone number are presumed to be reasonably accessible. If the holder does not designate a location where the retail buyer or buyer's designee may request a payoff statement or statement of payments, the retail buyer or buyer's designee may submit the written request to any physical address or mailing address of the holder.

(e) Verification of retail buyer. The holder may require the retail buyer to provide certain specified information (full name of the retail buyer, social security number, account number, unique password given to the retail buyer) to verify the requester's identity before processing the payoff statement or statement of payments.

(f) Content of payoff statement. The payoff statement must, at a minimum, contain the following information:

(1) the name of the holder;

(2) the address of the holder;

(3) the telephone number of the holder;

(4) the account number or other identifying number of the retail buyer, if applicable;

(5) the date of the payoff statement;

(6) the amount necessary to payoff the account, including daily accrual and known and identified subsequent events;

(7) a statement that specifies how and where to tender the payoff amount to the holder; and

(8) the last date upon which the payoff terms will be honored as specified by subsection (j) of this section.

(g) Delivery of payoff statement or statement of payments. The holder may provide the payoff statement or statement of payments to the retail buyer over the telephone or by mail, email, website address, or other means. If requested by the retail buyer or buyer's designee, the payoff statement or statement of payments must be given in writing.

(h) Cost of payoff statement or statement of payments. The retail buyer is entitled to one written payoff statement or written statement of payments free of charge during a six-month period. The charge for each additional written payoff statement or written statement of payments may not exceed $1.00. A holder may not charge a fee for a payoff statement or statement of payments unless the holder provides the statement in writing.

(i) Reasonable time period. In the case of a motor vehicle retail installment sales contract made under Texas Finance Code, Chapter 348, a reasonable time in which to respond to an inquiry for a payoff statement or statement of payments is:

(1) for accounts in litigation, bankruptcy, or repossession status, 5 (five) calendar days;

(2) for all other accounts not meeting the requirements of paragraph (1) of this subsection, two (2) business days.

(3) The reasonable time period for processing the payoff statement or statement of payments does not begin to run unless the retail buyer or buyer's designee provides the information necessary to verify the requester's identity.

(j) Payoff statement binding. Pursuant to Texas Finance Code, §348.408, a holder who gives the retail buyer or the buyer's designee outstanding balance information in a payoff statement is bound by that information and must honor that information for a reasonable time.

(1) If the holder gives the payoff statement to the retail buyer or buyer's designee by hand-delivery, facsimile, or email, a reasonable time is 10 calendar days.

(2) If the holder gives the payoff statement to the retail buyer or buyer's designee by first-class mail, registered or certified mail, or any other delivery method not specified by paragraph (1) of this subsection, a reasonable time is 15 calendar days.

§84.503. Collection Practices.

(a) In attempting to collect money due on a motor vehicle retail installment sales contract or to take possession of any property securing a motor vehicle installment sales contract, a licensee or the licensee's agent shall not use any means other than appeals to reason or lawful remedies authorized under the laws of this state.

(b) A licensee or the licensee's agent shall not use any physical force or violence against any person or use any physical force or violence against any property.

§84.504. Collection Contacts.

(a) A licensee or the licensee's agent shall have the right to contact any person in order to secure information concerning a retail buyer, unless any person other than the retail buyer, the retail buyer's spouse, a member of the retail buyer's household, a co-buyer, endorser, surety, or guarantor of the obligation, objects to any contact by a licensee or the licensee's agent. Upon receipt of the objection, the licensee or agent, shall cease and desist from any further contact with the person relative to the debt in question.

(b) A licensee or the licensee's agent shall not solicit the payment of all or any part of any debt subject to Texas Finance Code, Chapter 348 from any person other than the retail buyer, a co-buyer, endorser, surety, guarantor, retail buyer's designee, trustee, insurance company or service contract provider paying a claim involving the debtor or motor vehicle, executor or administrator of a will associated with the debt, or any party having a lawful right or claim to the motor vehicle.

(c) Without the prior written consent of the retail buyer given directly to the licensee or the express permission of a court of competent jurisdiction, a licensee may not communicate with a retail buyer in connection with the collection of amounts due under a motor vehicle retail installment sales contract at any unusual time. In the absence of any knowledge to the contrary, a licensee can assume that the convenient time for communicating with a retail buyer is after 8:00 a.m. and before 9:00 p.m., local time at the retail buyer's location.

(d) A licensee may not communicate with a retail buyer in connection with the collection of amounts due under a motor vehicle retail installment sales contract at the retail buyer's place of employment if the licensee has received written notification from the retail buyer or the

retail buyer's employer to cease communications with the retail buyer while at the place of employment. The licensee may require the retail buyer or retail buyer's employer to place the objection in writing. The objection, if required, should specify the name of the retail buyer or group of retail buyers subject to the objection. This restriction may be overridden by court order.

(e) Without the prior written consent of the retail buyer given directly to the licensee or the express permission of a court of competent jurisdiction, a licensee may not communicate any information pertaining to a debt or obligation unless the person receiving the information is the retail buyer, the retail buyer's attorney, the retail buyer's designee, a co-buyer, endorser, surety, or guarantor of the obligation, a consumer reporting agency, another creditor, the attorney of the creditor, or any party that has a lawful or permissible right to the information pursuant to the Federal Trade Commission's Privacy of Consumer Financial Information regulation, 16 C.F.R. §313.1, et seq., or similar privacy regulation. Unless notified pursuant to subsection (a) of this section, this prohibition does not apply to a licensee seeking information about the location of the retail buyer.

(f) In attempting to collect money due on a contract or to take possession of any property securing a motor vehicle retail installment sales contract, a licensee or the licensee's agent shall not use any simulated legal process, simulated legal document, or legal form designed to suggest that legal proceedings have been commenced or completed when in fact they have not.

(g) In attempting to collect money due on a motor vehicle retail installment sales contract, to take possession of any property securing a motor vehicle retail installment sales contract, or to secure information concerning a motor vehicle retail installment sales contract, a licensee or the licensee's agent shall not impersonate or attempt to impersonate any law enforcement officer or other agent of federal, state, or local governments, nor shall a licensee or a licensee's agent misrepresent the identity of the licensee.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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SUBCHAPTER G. EXAMINATIONS

7 TAC §§84.703 - 84.706

The Finance Commission of Texas (commission) proposes new §§84.703 - 84.706, concerning Examinations, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner.

The new rules contain new operational provisions regarding examination procedures. The purpose of the rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. The following paragraphs outline the individual purposes of each proposed rule.

Section 84.703 authorizes the commissioner to require a licensee to review records and make corrections, if an examination reveals that a licensee is engaging in a pattern or practice that appears to be a systemic violation of the law. The rule is necessary to ensure that transactions comply and that records are being maintained with the applicable law.

Section 84.704 provides the procedures for correcting violations of laws or errors on accounts. The rule is necessary to provide a uniform procedure for curing violations of law and correcting entries on accounts. The rule includes procedures for cash refunds and for refunds made by check, money order, or other negotiable instrument.

Section 84.705 details the procedures for handling unclaimed funds that are due to a retail buyer. The rule provides procedures that conform to Texas Property Code, Chapter 72.

Section 84.706 provides for a fee in addition to the assessment fee that may be charged to licensees who require an expedited follow-up examination due to noncompliance issues. The rule is necessary to permit the agency to recover the direct and indirect costs associated with conducting follow-up examinations.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rules are in effect there will be no fiscal implications for state or local government as a result of administering the rules.

Commissioner Pettijohn has determined that for each year of the first five years the new operational rules are in effect the public benefit anticipated will be that the commission's rules will conform to current practice, will be more easily understood by licensees required to comply with the rules, and will be more easily enforced.

Regarding §84.703, a person required to comply with the rules may be responsible for the potential costs of review and correcting records, but only if an examination reveals a pattern or practice that appears to be a systemic violation of the law. First, a records review would only be required if such a systemic violation has been discovered during the licensee's examination. For licensees receiving an examination without this finding, these costs will not apply. Second, once a systemic violation is found, much depends on the actions taken by the licensee to remedy the deficiencies. And third, in addition to the steps taken by the licensee in the interim, the extent of any records review will also depend on the types of issues and deficiencies cited. Thus, as a result of the fact-specific nature of review of records situations, these costs are impossible to predict for any particular licensee.

Likewise, concerning §84.706, a person required to comply with the rules may be responsible for the potential costs of follow-up examination fees, but only if a follow-up examination visit is required within nine months after a written deficiency report has been given to the licensee as a result of noncompliance. First, follow-up examinations only occur if a rating of "unacceptable" is received by the licensee. For those licensees not receiving an unacceptable rating, these costs will not apply. Second, once an unacceptable rating is received, much depends on the actions taken by the licensee to remedy the deficiencies prior to the return visit. And third, in addition to the steps taken by the licensee in the interim, the length of any follow-up examination will also depend on the types of issues and deficiencies cited. Therefore, due to the involvement of these numerous case-by-case factors, it is impossible to predict these costs for any particular licensee. The rule provides the best expectation possible by listing the rate of $100 per hour per examiner.

There is no anticipated adverse economic effect on small or micro businesses. Aside from the potential costs outlined in the preceding paragraphs, there will be no effect on individuals required to comply with the rules as proposed.

Comments on the proposed new rules may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed rules are published in the *Texas Register*. At the conclusion of the 31st day after the proposed rules are published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

These new sections are proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

These rules affect Texas Finance Code, Chapter 348.

§84.703. Review of Records.

One purpose of examinations by the OCCC is to determine the level of compliance with the law by the licensee. If the examination reveals a pattern or practice that appears to be a systemic violation of the law, the commissioner or the commissioner's representative may direct the licensee to review records and make appropriate changes to bring the licensee's records into compliance with the law. The appropriate changes may include restitution to customers for unlawful charges or unlawful amounts.

§84.704. Correction of Errors or Violations.

(a) Any amount due a retail buyer because of a correction of an error or a violation may be credited to the next payment or payments on the existing account of the retail buyer. The licensee must notify the retail buyer in writing of the date and amount of the next payment due after this credit has been given.

(b) In lieu of crediting an existing account, a refund may be made directly to the retail buyer by cash, check, money order or other negotiable instrument. The licensee must maintain sufficient records that the refund was made.

(1) Cash refunds. If the refund is made directly to the retail buyer in cash, the licensee must obtain a signed or authenticated acknowledgment from the retail buyer. The signed or authenticated acknowledgment must contain the following information:

(A) the retail buyer's full name;

(B) the retail buyer's account number (the account number upon which the refund was made);

(C) the amount of the refund; and

(D) a statement that the retail buyer received the refund in cash and that the licensee has not instructed or required the retail buyer to repay the cash refund.

(2) Refunds made by check, money order, or other negotiable instrument. If the refund is made directly to the retail buyer by check, money order or other negotiable instrument, the licensee must, at a minimum, mail the refund to the last known address of the retail buyer by first-class mail. The licensee must maintain a complete paper or electronic copy of the check, money order, or other negotiable instrument. The licensee must also maintain sufficient information that could be used to determine who successfully negotiated the check, money order, or other negotiable instrument. If the check or money order is drawn from an account that is not under the licensee's control, sufficient information will include the name of the bank or company upon which the refund check or money order is drawn, the account number upon which the refund check or money order is drawn, the amount of the check or money order, check or money order number, and routing or tracking number of the check or money order.

(c) If the error correction or adjustment to an account is related to an improper charge or proceeds improperly held by the licensee on which time price differential has been precomputed (regular transaction using sum of the periodic balances method or scheduled installment earnings method), the licensee may alternatively credit the final maturing installment or installments of the contract. In addition to the error correction or adjustment, a licensee must also give the retail buyer the proportionate amount of time price differential originally charged on the amount being credited.

(d) If the licensee applies the refund to an existing account of the licensee, the licensee may be required to refund the amount due a retail buyer plus the amount of accrued time price differential on the correction or adjustment amount or a proportionate amount of time price differential originally charged on the amount being credited. If more than half of the precomputed time balance (regular transaction using the sum of the periodic balance method or scheduled installment earnings method) has been paid before applying the credit to the account, the licensee may be required to refund the proportionate amount of time price differential originally charged on the amount being credited.

(e) If the error correction or adjustment is made to an account where the time price differential charge is earned using the true daily earnings method, the licensee must refund or credit the amount due a retail buyer in addition to the amount of accrued time price differential on the correction or adjustment amount.

§84.705. Unclaimed Funds.

(a) Escheat suspense account. The licensee must transfer any amounts due a retail buyer not paid within one year (i.e., unclaimed funds) to an escheat suspense account. The transfer must be noted on the account record of the retail buyer.

(b) Required information. Evidence of a bona fide attempt to pay a refund to a retail buyer must be kept in the records of the retail buyer. The licensee must place with the records of the retail buyer any information received by the licensee that indicates the retail buyer has died leaving no will or heirs or has left the community and the retail buyer's whereabouts are unknown. If deemed necessary, a licensee may be required to send the unclaimed funds by registered or certified mail to the last known address of the retail buyer.

(c) Use of unclaimed monies. Use of unclaimed funds within the business until such time as paid to the retail buyer, to the estate of the retail buyer, or to the State of Texas if the last known address of the retail buyer as shown on the records of the holder is in this state, is not prohibited; however, funds transferred to an escheat suspense account must not be commingled with the funds of the business.

(d) Escheat to state. At the end of three (3) years, the unclaimed funds must be paid to the State of Texas Comptroller of Public Accounts, Treasury Division, as required by Texas Property Code, §72.101.

(e) Record retention. The records of the escheat suspense account must be retained for a period of 10 years.

§84.706. Follow-up Examination Fees.

If a follow-up examination visit is required within nine (9) months after a written deficiency report has been given as a result of a failure

to comply with Texas Finance Code, Chapter 348, this chapter, or the special instruction section of the examination report, an examination fee at the hourly rate of $100 per examiner may be assessed.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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SUBCHAPTER H. RETAIL INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §84.808

The Finance Commission of Texas (commission) proposes new §84.808, concerning Retail Installment Sales Contract Provisions, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner.

Rule §84.808 is being relocated and reorganized. The agency believes that the reorganization will benefit licensees in that this rule will be easier to find in a more logical location and order which better tracks the organization of Texas Finance Code, Chapter 348. The relocated rule is substantially similar to the rule pending repeal, as found in 7 TAC §84.209, concerning Model Clauses. The commission's proposed repeal of this section is published elsewhere in this issue of the *Texas Register*.

Concerning new (relocated) §84.808, the rule (along with recently relocated §§84.801-84.807, and 84.809) implements the provisions of Texas Finance Code, §341.502, which require contracts under Chapter 342 or 348, whether in English or in Spanish, to be written in plain language. Use of the model clauses is optional; however, should a licensee choose not to use the model clauses, or a contract comprised of model clauses, then the licensee's non-standard contract must be submitted to the agency in accordance with the provisions of 7 TAC §84.802.

In reference to this relocated rule, the purpose of the rule tracks the original purpose language used when the rule was originally adopted. Please note that, aside from changes to section number references, the new rule contained in §84.808 is merely being relocated without changes.

The following paragraph outlines the purpose of the proposed rule. The Relocated rule is listed with the current location "(current §84.XXX)" listed after the proposed new section number.

Section 84.808 (current §84.209) contains the model clauses. These clauses are the administrative interpretation of a plain language version of typical contract provisions. Some model clauses are required by state and federal statutes and regulations depending on the circumstances of a particular transaction. Established model contract provisions encourage uniformity and provide benefits to consumers by making contracts easier to understand. A creditor is not limited to the contract provisions contained in these rules and retains flexibility to design contract forms suitable for the creditor's use. These multi-purpose contract provisions are intended for use by franchised dealers, independent dealers, holders of motor vehicle retail installment sales contracts, and individuals who sell less than five motor vehicles per year.

Leslie L. Pettijohn, Consumer Credit Commissioner, has determined that for the first five-year period the rule is in effect there will be no fiscal implications for state or local government as a result of administering the rule.

Commissioner Pettijohn has also determined that for each year of the first five years the rule is in effect, the public benefit anticipated as a result of the relocated rule will be enhanced compliance with the credit laws and consistency in credit contracts.

There is no anticipated cost to persons who are required to comply with the rule as proposed. There is no anticipated adverse economic effect on small or micro businesses. There will be no effect on individuals required to comply with the rule as proposed.

Comments on the proposed new rule may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by e-mail to laurie.hobbs@occc.state.tx.us. To be considered, a written comment must be received on or before the 31st day after the date the proposed rules are published in the *Texas Register*. At the conclusion of the 31st day after the proposed rules are published in the *Texas Register*, no further written comments will be considered or accepted by the commission.

This new section is proposed under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

This rule affects Texas Finance Code, Chapter 348.

§84.808. Model Clauses.

The following model clauses provide the plain language equivalent of provisions found in contracts subject to Texas Finance Code, Chapter 348.

(1) Identification of parties. This information identifies the parties to the contract.

(A) The model identification clause lists the name and address of the creditor, the date of the contract, and the name and address of the buyer. At the creditor's option, a creditor may include an account number or contract number. The model clause reads:
Figure: 7 TAC §84.808(1)(A)

(B) The Buyer is referred to as "I" or "me." The Seller is referred to as "you" or "your."

(2) Assignment of contract. The model clause regarding assignment of contract reads: "This contract may be transferred by the Seller."

(3) Buyer's affirmation and promise to pay. The model clause regarding buyer's affirmation and promise to pay reads: "The credit price is shown below as the "Total Sales Price." The "Cash Price" is also shown below. By signing this contract, I choose to purchase the motor vehicle on credit according to the terms of this contract. I agree to pay you the Amount Financed, Finance Charge, and any other charges in this contract. I agree to make payments according to the

Payment Schedule in this contract. If more than one person signs as a buyer, I agree to keep all the promises in this agreement even if the others do not."

(4) Inspection acknowledgment. The model clause regarding inspection acknowledgment reads: "I have thoroughly inspected, accepted, and approved the motor vehicle in all respects."

(5) Identification of motor vehicle. The motor vehicle identification information provision should contain the following information about the motor vehicle: the seller's stock number; the manufacturer's year model; the manufacturer's make; the manufacturer's model type or number; the vehicle identification number; the license plate number (if applicable); a new/used designation; and the primary purpose designation. The seller's stock number and the license number are both optional; the omission will not make a contract non-standard. The motor vehicle identification information provision may include additional information about the vehicle including, odometer reading, color, the designation as a heavy commercial vehicle, and key code. If the creditor includes this additional information about the motor vehicle, the change will not make the provision a non-standard provision. The model clause regarding identification of the motor vehicle reads:
Figure: 7 TAC §84.808(5)

(6) Trade-in vehicle description. The model clause regarding trade-in vehicle description reads:
Figure: 7 TAC §84.808(6)

(7) Truth in Lending Act disclosure. The model clause regarding Truth in Lending Act disclosure reads:
Figure: 7 TAC §84.808(7)

(8) Itemization of amount financed. The creditor drafting the contract is given considerable flexibility regarding the itemization of amount financed disclosure so long as the itemization of amount financed disclosure complies with the Truth in Lending Act. As an example, a creditor may disclose the manufacturer's rebate either as: a component of the downpayment; or a deduction from the cash price of the motor vehicle. The model contract provision for the itemization of the amount financed discloses the manufacturer's rebate as a component of the downpayment. If the creditor elected to disclose the manufacturer's rebate as a deduction from the cash price of the motor vehicle, the cash price component of the itemization of amount financed would be amended to reflect the dollar amount of the manufacturer's rebate being deducted from the cash price of the motor vehicle.

(A) The model clause regarding itemization of amount financed-sales tax advance reads:
Figure: 7 TAC §84.808(8)(A)

(B) The model clause regarding itemization of amount financed-sales tax deferred reads:
Figure: 7 TAC §84.808(8)(B)

(C) Plate transfer fee. Under Texas Transportation Code, §502.453, the creditor may charge under the itemization of amount financed a $5.00 fee for transferring license plates and receiving new registration insignia. The creditor may document the plate transfer fee in the Other Charges section with the following language: "to State for Plate Transfer Fee."

(D) Compliance fee prohibited. Under Texas Transportation Code, §503.0631(f), the creditor is prohibited from assessing an itemized charge under the itemization of amount financed for costs associated with complying with the temporary tag database.

(9) Documentary fee.

(A) The following notice satisfies the requirements of Texas Finance Code, §348.006 if printed in a size equal to at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous and within reasonable proximity to the place at which the fee is disclosed. The parenthetical phrase may be inserted at the dealer's option or the disclosure may be made without the parenthetical phrase if the dealer does not charge an amount in excess of $50 for either ordinary motor vehicles or heavy commercial vehicles or if the contract form is not used for heavy commercial vehicles. The model clause is contained in the Itemization of Amount Financed. The documentary fee clause reads: "A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50 (for a motor vehicle contract or a reasonable amount agreed to by the parties for a heavy commercial vehicle contract). This notice is required by law."

(B) The following notice is a sufficient Spanish translation of the documentary fee disclosure required by Texas Finance Code, §348.006. The parenthetical phrase may be inserted at the dealer's option or the disclosure may be made without the parenthetical phrase if the dealer does not charge an amount in excess of $50 for either ordinary motor vehicles or heavy commercial vehicles or if the contract form is not used for heavy commercial vehicles. The Spanish translation may read: "Un honorario de documentación no es un honorario oficial. Un honorario de documentación no es requerido por la ley, pero puede ser cargada al comprador como gastos de manejo de documentos y para realizar servicios relacionados con el cierre de una venta. Un honorario de documentación no puede exceder $50 (un contrato de vehículo automotor o una cantidad razonable acordada por las partes para un contrato de vehículo comercial pesado). Esta notificación es requerida por la ley." Or "Un cargo documental no es un cargo oficial. La ley no exige que se imponga un cargo documental. Pero èste podría cobrarse a los compradores por el manejo de la documentación y la prestación de servicios en relación con el cierre de una venta. Un cargo documental no puede exceder de $50 para (un contrato de vehículo automotor o una cantidad razonable acordada por las partes para un contrato de vehículo comercial pesado). Esta notificación se exige por ley."

(10) Deferred downpayments. The creditor has considerable flexibility in disclosing the deferred downpayments. The model provision discloses the deferred downpayments by placing the information, the due date and dollar amount of the deferred downpayments, in several boxes. If a creditor uses this model provision, the creditor would enter the due date and dollar amount of each deferred downpayment in the appropriate boxes. As an alternative to this model provision, a creditor may disclose the deferred downpayments in the Payment Schedule of the Amount Financed in the federal disclosure box. If a creditor elects this option, the due date and the dollar amount of the deferred downpayment must be shown. If the total amount of the deferred downpayment is not satisfied by the date of the second regularly scheduled installment, the deferred downpayment must be included in the Payment Schedule. As another alternative, the creditor may disclose the deferred downpayment amount in the Payment Schedule. The model clause regarding deferred downpayments reads:
Figure: 7 TAC §84.808(10)

(11) Required physical damage insurance. The creditor may chose to omit the statement of the retail buyer's right to obtain substitute coverage from another source. The model clause regarding required physical damage insurance reads:
Figure: 7 TAC §84.808(11)

(12) Optional insurance coverages. The model clause regarding optional insurance coverages reads:
Figure: 7 TAC §84.808(12)

(13) Optional credit life and accident and health insurance. The model clause regarding optional credit life and accident and health insurance reads:
Figure: 7 TAC §84.808(13)

(14) Liability insurance. If liability insurance coverage is not included in the contract, any of the following notices are sufficient to satisfy the requirements of Texas Finance Code, §348.205 if printed in a size equal to at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous:

(A) "THIS CONTRACT DOES NOT INCLUDE INSURANCE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS."

(B) "UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, LIABILITY INSURANCE COVERAGE FOR BODILY INJURY AND PROPERTY DAMAGE CAUSED TO OTHERS IS NOT INCLUDED IN THIS CONTRACT."

(C) "UNLESS A CHARGE FOR LIABILITY INSURANCE IS INCLUDED IN THE ITEMIZATION OF AMOUNT FINANCED, ANY INSURANCE REFERRED TO IN THIS CONTRACT DOES NOT INCLUDE COVERAGE FOR PERSONAL LIABILITY AND PROPERTY DAMAGE CAUSED TO OTHERS."

(15) Prohibition against oral modifications. The contract may include a provision barring oral modifications of the contract. A unilateral change to a contract may nevertheless occur as prescribed by the procedures in Texas Finance Code, Chapter 349, Subchapter C. The model clause regarding prohibition against oral modifications reads:
Figure: 7 TAC §84.808(15)

(16) Finance charge earnings methods:

(A) Regular transaction using sum of the periodic balances method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the add-on method as defined by the Texas Finance Commission Rule. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract." Or

(II) "The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance and added as a lump sum to the unpaid principal balance for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00."

(ii) Deferred sales tax. The model clause regarding deferred sales tax reads: "The Finance Charge will be calculated by using the add-on method. Add-on Finance Charge is calculated on the full amount of the unpaid principal balance subject to a finance charge and added as a lump sum to the unpaid principal balance subject to a Finance Charge for the full term of the contract. The add-on Finance Charge is calculated at a rate of $____ per $100.00."

(B) True daily earnings method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the true daily earnings method as defined by the Texas Finance Code. Under the true daily earnings method, the Finance Charge will be figured by applying the daily rate to the unpaid portion of the Amount Financed for the number of days the unpaid portion of the Amount Financed is outstanding. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or returned check charges." Or

(II) If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is not deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. The daily rate is 1/365th of the contract rate. The unpaid principal balance does not include the late charges or returned check charges."

(ii) Deferred sales tax: If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the true daily earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. The daily rate is 1/365th of the contract rate. The unpaid principal balance subject to a finance charge does not include the late charges, sales tax, or returned check charges."

(C) Scheduled installment earnings method.

(i) Sales tax advance. At the creditor's option a creditor may choose one of the following model clauses regarding sales tax advance:

(I) "You figure the Finance Charge using the scheduled installment earnings method as defined by the Texas Finance Code. Under the scheduled installment earnings method, the Finance Charge is figured by applying the daily rate to the unpaid portion of the Amount Financed as if each payment will be made on its scheduled payment date. The daily rate is 1/365th of the Annual Percentage Rate. The unpaid portion of the Amount Financed does not include late charges or returned check charges." Or

(II) If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is not deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You will figure the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance. You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance does not include the late charges or returned check charges."

(ii) Deferred sales tax. If a retail seller requires a retail buyer to purchase credit life or credit accident and health insurance and the sales tax is deferred, the contract rate disclosure should read: "The contract rate is _____%. This contract rate may not be the same as the Annual Percentage Rate. You figured the Finance Charge by applying the scheduled installment earnings method as defined by the Texas Finance Code to the unpaid portion of the principal balance subject to a Finance Charge. You based the Finance Charge, Total of Payments,

and Total Sale Price as if all payments were made as scheduled. The unpaid principal balance subject to a Finance Charge does not include the late charges, sales tax, or returned check charges."

(17) Consumer warning. The following notices satisfy the requirements of Texas Finance Code §348.102(d) if printed in at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous.

(A) For contracts using the sum of the periodic balances method (Rule of 78s) or the scheduled installment earnings method, the notice may read:

(i) "NOTICE TO THE BUYER--I WILL NOT SIGN THIS CONTRACT BEFORE I READ IT OR IF IT CONTAINS ANY BLANK SPACES. I AM ENTITLED TO A COPY OF THE CONTRACT I SIGN. UNDER THE LAW, I HAVE THE RIGHT TO PAY OFF IN ADVANCE ALL THAT I OWE AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE. I WILL KEEP THIS CONTRACT TO PROTECT MY LEGAL RIGHTS." Or

(ii) "NOTICE TO THE BUYER--THE BUYER SHOULD NOT SIGN THIS CONTRACT BEFORE READING IT OR IF IT CONTAINS ANY BLANK SPACES. THE BUYER IS ENTITLED TO A COPY OF THE SIGNED CONTRACT. UNDER THE LAW, THE BUYER HAS THE RIGHT TO PAY OFF IN ADVANCE ALL THAT THE BUYER OWES AND UNDER CERTAIN CONDITIONS MAY OBTAIN A PARTIAL REFUND OF THE FINANCE CHARGE. THE BUYER SHOULD KEEP THIS CONTRACT TO PROTECT ITS LEGAL RIGHTS."

(B) For contracts using the true daily earnings method, the notice may read: "NOTICE TO THE BUYER--I WILL NOT SIGN THIS CONTRACT BEFORE I READ IT OR IF IT CONTAINS ANY BLANK SPACES. I AM ENTITLED TO A COPY OF THE CONTRACT I SIGN. UNDER THE LAW, I HAVE THE RIGHT TO PAY OFF IN ADVANCE ALL THAT I OWE AND UNDER CERTAIN CONDITIONS MAY SAVE A PORTION OF THE FINANCE CHARGE. I WILL KEEP THIS CONTRACT TO PROTECT MY LEGAL RIGHTS."

(18) Buyer's acknowledgment of contract receipt.

(A) The following acknowledgments conform to the requirements of Texas Finance Code, §348.112 if they appear directly above the place for the buyer's signature in at least 10-point type that is boldfaced, capitalized, underlined, or otherwise set out from surrounding written material so as to be conspicuous. A creditor may choose the most appropriate option:

(i) If the buyer's signature is dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. A reasonable period of time would ordinarily be three days, excluding Sundays and holidays. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT. WHEN I SIGN THE CONTRACT, I WILL RECEIVE THE COMPLETED CONTRACT. IF NOT, I UNDERSTAND THAT A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME."

(ii) If the buyer's signature is not dated. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT. I RECEIVED THE COMPLETED CONTRACT ON (MO.) (DAY) (YR.)."

(iii) If the buyer's signature is not dated. If this clause is chosen, the copy must be mailed within a reasonable period of time. The model acknowledgment may read: "I SIGNED THIS CONTRACT ON AND A COPY WILL BE MAILED TO ME WITHIN A REASONABLE TIME."

(iv) If the buyer's signature is not dated but the contract contains the date of the transaction. The model acknowledgment may read: "I AGREE TO THE TERMS OF THIS CONTRACT AND ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF IT. I CONFIRM THAT BEFORE I SIGNED THIS CONTRACT, YOU GAVE IT TO ME, AND I WAS FREE TO TAKE IT AND REVIEW IT."

(B) Acceptance of contract receipt. The model clause regarding acceptance of contract receipt reads:
Figure: 7 TAC §84.808(18)(B)

(19) Consumer Credit Commissioner notice. The following notice satisfies the requirements of Texas Finance Code, §14.104 and §1.901 of this title (relating to Consumer Notifications). The telephone number of the retail seller, creditor, or holder may be printed in conjunction with the name and address of the retail seller, creditor, or holder elsewhere on the contract or agreement provided the notice required by Texas Finance Code, §14.104 is amended to direct the reader's attention to the area of the contract where the telephone number may be found. The consumer credit commissioner notice reads: "To contact (insert authorized business name of retail seller, creditor or holder as appropriate) about this account, call (insert telephone number of retail seller, creditor, or holder as appropriate). This contract is subject in whole or in part to Texas law which is enforced by the Consumer Credit Commissioner, 2601 N. Lamar Blvd., Austin, Texas 78705-4207; (800) 538-1579; www.occc.state.tx.us, and can be contacted relative to any inquiries or complaints."

(20) Finance charge refund method. If a contract uses the finance charge refunding method of the sum of the periodic balances or the scheduled installment earnings method, the finance charge refund provision reads: "If I prepay in full, I may be entitled to a refund of part of the Finance Charge." On contracts using the true daily earnings method, this finance charge refund provision should not be disclosed because it is not applicable.

(A) Contracts using the sum of the periodic balances method.

(i) Name of method. The model clause to identify the method of refunding finance charge reads: "You will figure the Finance Charge refund by using the sum of the periodic balances method as defined by the Texas Finance Commission rule."

(ii) Optional description of method. The creditor may include the following additional description of the method. The model clause reads: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge Refund will be computed upon the entire Finance Charge minus the Acquisition Cost. I will not get a refund if it is less than $1.00."

(iii) Optional description of method for use in contracts for heavy commercial vehicles. At the creditor's option, a contract for a heavy commercial vehicle, as defined in the Texas Finance Code, may include the following description of the method. The model clause reads: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule. The Finance Charge refund will be computed based upon the entire Finance Charge calculated using the sum of the periodic balances method. Then you will subtract the Acquisition Cost from that amount. I will not get a refund if it is less than $1.00."

(B) Contracts using the scheduled installment earnings method.

(i) Name of method. The model clause to identify the method of refunding finance charge reads: "You will figure the Finance Charge refund by the scheduled installment earnings method as defined by the Texas Finance Commission rule."

(ii) Optional description of method. The creditor may include the following additional description of the method: "You will figure my refund by deducting earned finance charges from the Finance Charge. You will figure earned finance charges by applying a daily rate to the unpaid principal balance as if I paid all my payments on the date due. If I prepay between payment due dates, you will figure earned finance charges for the partial payment period. You do this by counting the number of days from the due date of the prior payment through the date I prepay. You then multiply that number of days times the daily rate. The daily rate is 1/365th of the Annual Percentage Rate. You will also add the acquisition cost of $25 (or $150 for a heavy commercial vehicle) to the earned finance charge. I will not get a refund if it is less than $1.00."

(C) Flexible contract forms designed to accommodate alternative methods. Creditors may use a flexible contract form with alternative earnings methods, so long as the method used on a particular contract is permissible for that contract. The following clause illustrates one way that this flexibility may be accomplished: "You will figure the Finance Charge refund using the sum of the periodic balances method as defined by the Texas Finance Commission rule if: this contract is a Regular Payment Contract as defined by the Texas Finance Commission rule, and this contract does not have a term greater than 61 months. If this contract is not a Regular Payment Contract or if it has a term greater than 61 months, you will figure the Finance Charge refund using the scheduled installment earnings method as defined by the Texas Finance Commission rule. I will not get a refund if it is less than $1.00."

(21) Application of payments. In this provision, the term "finance charge" should not be construed to have the same meaning as Finance Charge as defined by the Truth in Lending Act. A default or late charge is considered to be a finance charge under Texas law; therefore, a default or late charge can be charged and collected as part of the earned finance charge. At the creditor's option the creditor may modify the application of payments language by adding "and late charges" following the phrase "earned but unpaid finance charge." The model clause reads:
Figure: 7 TAC §84.808(21)

(22) Effect of early and late payments. For contracts using the true daily earnings method, the model clause reads: "You based the Finance Charge, Total of Payments, and Total Sale Price as if all payments were made as scheduled. If I do not timely make all my payments in at least the correct amount, I will have to pay more Finance Charge and my last payment will be more than my final scheduled payment. If I make scheduled payments early, my Finance Charge will be reduced (less). If I make my scheduled payments late, my Finance Charge will increase."

(23) Interest on matured amount. The model provision for interest on any matured amount at any rate permitted by law reads: "If I don't pay all I owe when the final payment becomes due, or I do not pay all I owe if you demand payment in full under this contract, I will pay an interest charge on the amount that is still unpaid. That interest charge will be the higher rate of 18% per year or the maximum rate allowed by law, if that rate is higher. The interest charge for this amount will begin the day after the final payment becomes due." In this provision, the maximum rate allowed by law refers to the rate found in Texas Finance Code, Chapter 303.

(24) Balloon payments. If the contract has a balloon payment, the creditor must include a provision in the contract that allows the buyer to refinance the balloon payment over time. The provision must comply with Texas Finance Code, §348.123. The model provision for defining the balloon payment reads: "A balloon payment is a scheduled payment more than twice the amount of the average of my scheduled payments, other than the downpayment, that are due before the balloon payment."

(A) Paying the balloon payment. If a retail installment contract contains a balloon payment that is the final payment, the contract must also provide the right for the retail buyer to pay the balloon payment. The model provision for paying the amount of the final scheduled balloon payment reads: "I can pay all I owe when the balloon payment is due and keep my motor vehicle."

(B) Balloon payment alternatives. If the retail installment contract contains the right for a retail buyer to refinance a balloon installment, the contract provision to refinance the installment must comply with either clause (i) or (ii) of this subparagraph. A contract under clause (ii) of this subparagraph must also contain the right of the retail buyer to sell the motor vehicle back to the holder or the retail seller.

(i) The model clause to describe a buyer's right to refinance a balloon installment under Texas Finance Code, §348.123(a), when applicable reads: "If I buy the motor vehicle primarily for personal, family, or household use, I can enter into a new written agreement to refinance the balloon payment when due without a refinancing fee. If I refinance the balloon payment, my periodic payments will not be larger or more often than the payments in this contract. The annual percentage rate in the new agreement will not be more than the Annual Percentage Rate in this contract. This provision does not apply if my Payment Schedule has been adjusted to my seasonal or irregular income."

(ii) If the contract contains a balloon payment and the seller intends Texas Finance Code, §348.123(b)(5) to apply to the contract:

(I) Special right to refinance balloon payment under Texas Finance Code, §348.123(b)(5)(B)(iii). The model clause reads: "I can enter into a new agreement to refinance my last installment if I am not in default. I can refinance at an annual percentage rate up to 5 points greater than the Annual Percentage Rate shown in this contract. The rate will not be more than applicable law allows. The new agreement will allow me to refinance the last installment for at least 24 months with equal monthly payments. You and I can also agree to refinance the last installment over another time period or on a different payment schedule."

(II) Repurchase option. If the contract includes a balloon payment, the creditor must draft a provision addressing the repurchase option.

(25) Agreement to keep motor vehicle insured. The model clause regarding agreement to keep the motor vehicle insured reads: "I agree to have physical damage insurance covering loss or damage to the motor vehicle for the term of this contract. The insurance must cover your interest in the vehicle." The creditor may include the following optional provision: "The insurance must include collision coverage and either comprehensive or fire, theft, and combined additional coverage."

(26) Creditor's right to purchase required insurance if buyer fails to keep motor vehicle insured. The model clause regarding agreement to allow the creditor to purchase required insurance if

the buyer fails to keep the motor vehicle insured reads: "If I fail to give you proof that I have insurance, you may buy physical damage insurance. You may buy insurance that covers my interest and your interest in the motor vehicle, or you may buy insurance that covers your interest only. I will pay the premium for the insurance and a finance charge at the contract rate. If you obtain collateral protection insurance, you will mail notice to my last known address shown in your file."

(27) Physical damage insurance proceeds. The model clause regarding physical damage insurance proceeds reads: "I must use physical damage insurance proceeds to repair the motor vehicle, unless you agree otherwise in writing. However, if the motor vehicle is a total loss, I must use the insurance proceeds to pay what I owe you. I agree that you can use any proceeds from insurance to repair the motor vehicle, or you may reduce what I owe under this contract. If you apply insurance proceeds to the amount I owe, they will be applied to my payments in the reverse order of when they are due. If my insurance on the motor vehicle or credit insurance doesn't pay all I owe, I must pay what is still owed. Once all amounts owed under this contract are paid, any remaining proceeds will be paid to me."

(28) Returned insurance premiums and service contract charges. The contract may authorize a creditor to apply charges returned to the creditor for canceled insurance, service contract, and extended warranty charges to the buyer's obligation under the agreement as permitted by law, regardless of whether or not the buyer is in default under the contract.

(A) The model clause for contracts using the true daily earnings method reads: "If you get a refund on insurance or service contracts, or other contracts included in the cash price, you will subtract it from what I owe. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me."

(B) For contracts using the scheduled installment earnings or sum of the periodic balances methods, the creditor may substitute the following clause: "If you get a refund of insurance or service contract charges, you will apply it and the unearned finance charges on it in the reverse order of the payments to as many of my payments as it will cover. Once all amounts owed under this contract are paid, any remaining refunds will be paid to me."

(29) Application of credits. The model clause regarding application of credits reads: "Any credit that reduces my debt will apply to my payments in the reverse order of when they are due, unless you decide to apply it to another part of my debt. The amount of the credit and all finance charge or interest on the credit will be applied to my payments in the reverse order of my payments."

(30) Transfer of rights. The seller does not have a duty to disclose the terms on which a contract or a balance under a contract is acquired, including any discount or difference between the rates, charges, or balance under the contract and the rates, charges, or balance acquired as provided by Texas Finance Code, §348.301. The model clause regarding transfer of rights reads: "You may transfer this contract to another person. That person will then have all your rights, privileges, and remedies."

(31) Grant of security interest in collateral. The model clause regarding a description of a security interest granted in a typical motor vehicle installment sale reads:
Figure: 7 TAC §84.808(31)

(32) Agreements regarding use and transfer of motor vehicle. The contract may contain a provision prohibiting a buyer from transferring any interest in the motor vehicle without the creditor's written permission, requiring the buyer to notify the seller of change of address, or prohibiting the removal of the motor vehicle from Texas. The transfer fee limitation establishes the maximum fee that a creditor could contract for, charge, or collect for transferring the buyer's equity in the motor vehicle to another party. If desired, a creditor may amend the model provision to reflect a lower transfer fee amount. The model clause concerning agreements regarding the use and transfer of the motor vehicle reads: "I will not sell or transfer the motor vehicle without your written permission. If I do sell or transfer the motor vehicle, this will not release me from my obligations under this contract, and you may charge me a transfer of equity fee of $25 ($50 for a heavy commercial vehicle). I will promptly tell you in writing if I change my address or the address where I keep the motor vehicle. I will not remove the motor vehicle (Optional: motor vehicle or other collateral) from Texas for more than 30 days unless I first get your written permission."

(33) Care of motor vehicle. The contract may obligate the buyer to keep the motor vehicle free of liens and encumbrances, require the buyer to keep the motor vehicle in good working order and repair, or prohibit the buyer from allowing the motor vehicle to be exposed to seizure, confiscation, or other involuntary transfer. The model clause regarding care of the motor vehicle reads: "I agree to keep the motor vehicle free from all liens and claims except those that secure this contract. I will timely pay all taxes, fines, or charges pertaining to the motor vehicle. I will keep the motor vehicle in good repair. I will not allow the motor vehicle to be seized or placed in jeopardy, or use it illegally. I must pay all I owe even if the motor vehicle is lost, damaged or destroyed. If a third party takes a lien or claim against or possession of the motor vehicle, you may pay the third party any cost required to free the motor vehicle from all liens or claims. You may immediately demand that I pay you the amount paid to the third party for the motor vehicle. If I do not pay this amount, you may repossess the motor vehicle and add that amount to the amount I owe. If you do not repossess the motor vehicle, you may still demand that I pay you, but you cannot compute a finance charge on this amount."

(34) Default rights and repossession provisions. This paragraph details agreements allowing acceleration of the buyer's obligation upon the buyer's default or upon the creditor's determination of insecurity as permitted by Texas Business and Commerce Code, §1.309. The following provisions are samples of model clauses regarding some of the default rights and remedies of a creditor in a typical motor vehicle installment sale transaction:

(A) Acceleration and default. The model clause regarding acceleration and default reads:
Figure: 7 TAC §84.808(34)(A)

(B) Late charge. The model clause regarding late charge reads: "I will pay you a late charge as agreed to in this contract when it accrues."

(C) Repossession. At the creditor's option, a creditor may choose one of the following model provisions pertaining to repossession. The model clauses regarding repossession read:

(i) "If I default, you may repossess the motor vehicle from me if you do so peacefully. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle." In this provision, the term "peacefully" is intended to have the same meaning as "without breaching the peace," as determined by the Texas courts, and as found under clause (ii) of this subparagraph. Or

(ii) "If I default, you may repossess the motor vehicle from me if you do so without breaching the peace. If any personal items are in the motor vehicle, you can store them for me and give me written notice at my last address shown on your records within 15 days of discovering that you have my personal items. If I do not ask for these items back within 31 days from the day you mail or deliver the notice to me, you may dispose of them as applicable law allows. Any accessory, equipment, or replacement part stays with the motor vehicle."

(D) Buyer's right to redeem. The model clause regarding buyer's right to redeem reads: "If you take my motor vehicle, you will tell me how much I have to pay to get it back. If I do not pay you to get the motor vehicle back, you can sell it or take other action allowed by law. My right to redeem ends when the motor vehicle is sold or you have entered into a contract for sale or accepted the collateral as full or partial satisfaction of a contract."

(E) Disposition of motor vehicle. The model clause regarding disposition of the motor vehicle reads: "If I don't pay you to get the motor vehicle back, you can sell it or take other action allowed by law. You will send me notice at least 10 days before you sell it. You can use the money you get from selling it to pay allowed expenses and to reduce the amount I owe. Allowed expenses are expenses you pay as a direct result of taking the motor vehicle, holding it, preparing it for sale, and selling it. If any money is left, you will pay it to me unless you must pay it to someone else. If the money from the sale is not enough to pay all I owe, I must pay the rest of what I owe you plus interest. If you take or sell the motor vehicle, I will give you the certificate of title and any other document required by state law to record transfer of title."

(F) Collection costs. The model clause regarding collection costs reads: "If you hire an attorney who is not your employee to enforce this contract, I will pay reasonable attorney's fees and court costs as the applicable law allows."

(G) Cancellation of optional insurance or service contracts. The model clause regarding cancellation of optional insurance or service contracts reads: "This contract may contain charges for insurance or service contracts or for services included in the cash price. If I default, I agree that you can claim benefits under these contracts to the extent allowable, and terminate them to obtain refunds of unearned charges to reduce what I owe or repair the motor vehicle."

(35) Acceleration, waiver of notice of intent to accelerate, and notice of acceleration. A model clause regarding the holder's right to accelerate maturity of the contract and to waive the buyer's or co-buyer's common law right to notice of intent to accelerate, notice of acceleration, or both reads: "If I default, or you believe in good faith that I am not going to keep any of my promises, you can demand that I immediately pay all that I owe. You don't have to give me notice that you are demanding or intend to demand immediate payment of all that I owe."

(36) Refund upon acceleration. For contracts using the sum of the periodic balances or scheduled installment earnings methods, the model clause regarding the buyer's right to a finance charge refund upon acceleration of the contract reads: "If you demand that I pay you all that I owe, you will give me a credit of part of the Finance Charge as if I had prepaid in full."

(37) Integration and severability.

(A) The contract may include an integration clause indicating that the parties to the contract intend it to be the final written expression of their agreement. The model clause regarding integration reads: "This contract contains the entire agreement between you and me relating to the sale and financing of the motor vehicle."

(B) The contract may also include a severability clause providing that the invalidity of any portion of the contract does not render invalid other parts of the contract that would otherwise be valid. The model clause regarding severability reads: "If any part of this contract is not valid, all other parts stay valid."

(38) No waiver and limitations on creditor's rights and usury savings.

(A) A model clause to prevent a creditor's delay in enforcing rights under the contract from affecting a waiver of those rights reads: "If you don't enforce your rights every time, you can still enforce them later."

(B) A provision establishing limitations on the creditor's rights reads: "You will exercise all of your rights in a lawful way."

(C) The model clause regarding usury savings reads: "I don't have to pay finance charge or other amounts that are more than the law allows. This provision prevails over all other parts of this contract and over all your other acts."

(39) Applicable law. A model clause to establish the law that will apply to the contract reads: "Federal law and Texas law apply to this contract."

(40) Warranty disclaimer. The disclaimer of express and implied warranties should be set out from the surrounding text so that the disclosure is conspicuous. A disclaimer of express and implied warranties, such as the following, is permitted by Texas Business and Commerce Code, Article 2, Subchapter C, and reads: "Unless the seller makes a written warranty, or enters into a service contract within 90 days from the date of this contract, the seller makes no warranties, express or implied, on the motor vehicle, and there will be no implied warranties of merchantability or of fitness for a particular purpose. This provision does not affect any warranties covering the motor vehicle that the motor vehicle manufacturer may provide."

(41) Preservation of consumer's claims and defenses notice. This notice only applies if the motor vehicle financed in the contract was purchased for personal, family, or household use. The preservation of consumer's claims and defenses notice disclosure should be set out from the surrounding text so that the disclosure is in all capitals, boldfaced and in at least 10-point type. The preservation of consumer's claims and defenses notice disclosure, as required by the Federal Trade Commission's preservation of consumer's claims and defenses notice, 16 C.F.R. §§433.1 et seq., reads: "NOTICE: ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER. This provision applies to this contract only if the motor vehicle financed in the contract was purchased for personal, family, or household use."

(42) Used car buyer's guide. The used car buyer's guide disclosure should be set out from the surrounding text so that the disclosure is conspicuous. The disclosure should be prefaced by the words "In this box only, the word "you" refers to the Buyer." The used car buyer's guide disclosure, as required by the Federal Trade Commission's Used Car Regulation, 16 C.F.R. §§455.1 et seq., reads:

(A) "Used Car Buyer's Guide. The information you see on the window form for this vehicle is part of this contract. Information on the window form overrides any contrary provisions in the contract of sale."

(B) Spanish Translation: "Guía para compradors de vehículos usados. La información que ve en el formulario de la ventanilla para este vehículo forma parte del presente contrato. La información del formulario de la ventanilla deja sin efecto toda disposición en contrario contenida en el contrato de venta."

(43) Negotiability and assignment. The disclosure of the negotiability of the contract should be placed on the front side of the contract and may read:

(A) "The Annual Percentage Rate may be negotiated with the Seller. The Seller may assign this contract and retain its right to receive a part of the Finance Charge";

(B) "The rates of this contract are negotiable. The seller may assign or otherwise sell this contract and receive a discount or other payment for the difference between the rate, charges, or balance"; or

(C) "A customer may obtain their own financing. The finance charge may be negotiable. The dealership may assign the retail installment contract. There is no duty to disclose the terms for the sale of this contract (e.g., price paid to retail seller to purchase retail installment contract)."

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802034
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 936-7611

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TITLE 16. ECONOMIC REGULATION

PART 8. TEXAS RACING COMMISSION

CHAPTER 311. OTHER LICENSES

SUBCHAPTER A. LICENSING PROVISIONS

DIVISION 1. OCCUPATIONAL LICENSES

16 TAC §311.3

The Texas Racing Commission proposes amendments to 16 TAC §311.3, Information for Background Investigation. Section 311.3 requires applicants for a new or renewed license to submit fingerprints along with their application documents so that the Commission may conduct a criminal history check. Section 311.3 also provides certain exceptions to the requirement to submit fingerprints, including an exception for those who have submitted fingerprints within the previous five years. The changes to §311.3 reduce this exception from a five year period to a three year period.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to enhance the integrity of racing by conducting background checks on licensees more frequently than every five years. The amendment will also bring this portion of the Commission's rules into alignment with the model rules adopted by the Association of Racing Commissioners International.

The rule will have no adverse economic effect on small or micro-businesses since there are no additional costs or fees associated with the change, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Gloria Giberson, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, §5.03, which requires applicants to submit fingerprints, §7.10, which allows the Commission to waive the fingerprint requirement applicants who already hold a valid license from another state, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Civil Statutes, Article 179e.

§311.3. Information for Background Investigation.

(a) Fingerprint Requirements and Procedure.

(1) Except as otherwise provided by this section, an applicant for a license must submit with the application documents a set of the applicant's fingerprints on a form prescribed by the Department of Public Safety. If the applicant is not an individual, the applicant must submit a set of fingerprints on the above-referenced forms for each individual who:

(A) serves as a director, officer, or partner of the applicant;

(B) holds a beneficial ownership interest in the applicant of 5.0% or more; or

(C) owns any interest in the applicant, if requested by the Department of Public Safety.

(2) The fingerprints must be taken by a peace officer or a person authorized by the Commission.

(3) Not later than 10 business days after the day the Commission receives the sets of fingerprints under this section, the Commission shall forward the fingerprints to the Department of Public Safety.

(4) A person who desires to renew an occupational license must have submitted a set of fingerprints pursuant to this section within the three [~~five~~] years prior to renewal or provide a new set of fingerprints for classification by the Federal Bureau of Investigation.

(5) Waiver.

(A) Pursuant to Texas Civil Statutes, Art. 179e, §7.10, the Commission will waive the fingerprint requirements in this section for an applicant for an owner or trainer license if:

(i) the individual presents proof of a valid owner or trainer license issued in a racing jurisdiction that requires the submission of fingerprints to the Federal Bureau of Investigation and the Commission verifies that fingerprints were submitted by that jurisdiction for the applicant within the three [~~five~~] years preceding the date of the application in Texas; and

(ii) the applicant's permanent residence is outside the State of Texas.

(B) This subsection does not apply to an applicant who:

(i) has a criminal history in another state, as revealed by a report by the Federal Bureau of Investigation or other reliable criminal information sources;

(ii) maintains a residence or is employed, whether self-employed or otherwise, in Texas; or

(iii) obtains a license badge issued by the Commission which gives the applicant access to a restricted area on association grounds.

(C) Notwithstanding a waiver of the fingerprint requirements under this subsection, the Commission reserves the right, at its sole discretion, to require the submission of fingerprints after a license has been issued.

(b) Criminal History Record.

(1) For each individual who submits fingerprints under subsection (a) of this section, the Commission shall obtain a criminal history record maintained by the Texas Department of Public Safety and the Federal Bureau of Investigation.

(2) The Commission may obtain criminal history record information from any law enforcement agency.

(3) Except as otherwise provided by this subsection, the criminal history record information received under this section from any law enforcement agency that requires the information to be kept confidential as a condition of release of the information is for the exclusive use of the Commission and its agents and is privileged and confidential. The information may not be released or otherwise disclosed to any person or agency except in a criminal proceeding, in a hearing conducted by the Commission, on court order, or with the consent of the applicant. Information that is in a form available to the public is not privileged or confidential under this subsection and is subject to public disclosure.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802070
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 833-6699

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CHAPTER 319. VETERINARY PRACTICES AND DRUG TESTING
SUBCHAPTER D. DRUG TESTING
DIVISION 2. TESTING PROCEDURES

16 TAC §319.336

The Texas Racing Commission proposes amendments to 16 TAC §319.336, Payment of Testing Costs. Section 319.336 relates to the accounting and payment of drug testing costs out of money held by racing associations to pay outstanding pari-mutuel tickets and vouchers. The change to §319.336 replaces the specific process detailed in paragraph §319.336(c)(1) with a referral to new §321.36, which is published elsewhere in this edition of the *Texas Register*.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to align the rule with the statutory changes in the Texas Racing Act that occurred as a result of HB 2701, which was passed in the 80th Regular Session of the Texas Legislature.

The rule will have no adverse economic effect on small or micro-businesses, and therefore preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendment.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Gloria Giberson, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, §3.07, which requires drug testing of race animals and provides for the payment of the associated costs, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Civil Statutes, Article 179e.

§319.336. Payment of Testing Costs.

(a) Responsibility for Payment. Immediately on receipt of approved charges for conducting tests under this subchapter, an association shall pay the charges.

(b) Authority to Use Outstanding Tickets and Pari-mutuel Vouchers. An association may use money held by the association to pay outstanding tickets and outstanding pari-mutuel vouchers to pay for charges under this section. If the money held is insufficient to pay the charges, the association shall pay the remainder of the charges.

(c) Accounting and Payment of Remainder.

(1) The accounting and payment of remainder of outs and vouchers to the Commission shall be done in accordance with §321.36. [~~No later than 5:00 p.m. on September 30 of each year, an association shall pay to the Commission the cash value of outstanding tickets remaining after the association offsets the drug testing costs incurred during the prior mutuel year. No later than 5:00 p.m. on October 31 of each year, an association shall provide to the Commission, on a form prescribed by the executive secretary, an accounting of the outstanding tickets and pari-mutuel vouchers held by the association on September 29 of that year and the drug testing charges paid by the association.~~]

(2) The executive secretary will review the accounting submitted by the association. If the executive secretary determines the accounting is in error, the executive secretary may adjust the amount due to the Commission from outstanding tickets and either demand payment of the additional amount owed or reimburse the association for the excess amount paid to the Commission.

(d) Pooling of Drug Testing Costs. The executive secretary may establish a procedure to pay drug testing costs by pooling the amounts held by all associations to pay outstanding tickets. If the amount held by an association does not cover the full costs of drug testing for that association, the executive secretary may pay those costs using funds paid to the Commission under subsection (c)(1) of this section.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802071
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 833-6699

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CHAPTER 321. PARI-MUTUEL WAGERING
SUBCHAPTER A. MUTUEL OPERATIONS
DIVISION 3. MUTUEL TICKETS AND VOUCHERS

16 TAC §§321.31, 321.33, 321.36, 321.37, 321.41, 321.42

The Texas Racing Commission proposes amendments to 16 TAC §§321.31, 321.33, 321.37, and 321.41. The Commission also proposes new §321.36 and §321.42. These sections relate to the information that must be printed on the face of each pari-mutuel ticket and voucher, the cashing of outstanding tickets and vouchers, the expiration of tickets and vouchers, and the remittance of unclaimed outstanding tickets and vouchers after drug testing costs have been paid. The proposed amendments provide that outstanding tickets and vouchers expire one year after issuance, require that each ticket and voucher must have the expiration date printed on its face, and describe the process by which associations must remit expired tickets and vouchers to the Commission after offsetting allowable drug testing costs. These changes are necessary to align the rules with the statutory changes in the Texas Racing Act that occurred as a result of HB 2701, which was passed in the 80th Regular Session of the Texas Legislature.

The change to §321.31, Vouchers, requires that the expiration date of a voucher be on its face.

The changes to §321.33, Expiration Date, provide that tickets and vouchers issued on or after September 1, 2007, expire one year after the date of issuance. The changes also provide that tickets issued during August 2007 will expire at the close of business on September 29, 2008, and that vouchers issued prior to September 2007 shall not expire.

New §321.36 provides that racing associations shall remit payments on a quarterly basis along with reports that show the amount of unclaimed outstanding tickets and vouchers that expired, the amount needed to reimburse the association for drug testing costs, and the amount of excess expired tickets and vouchers due to the Commission.

The change to §321.37, Cashed Tickets and Vouchers, requires racing associations to ensure the security of outstanding vouchers.

The change to §321.41, Cashing Outstanding Tickets, changes the length of time from 10 days to 21 days before an issued but uncashed ticket becomes outstanding.

New §321.42, Cashing Outstanding Vouchers, sets out the process an association must follow when cashing outstanding vouchers.

Charla Ann King, Executive Director for the Texas Racing Commission, has determined that for the first five year period the amendment is in effect there will be no fiscal implications for state or local government as a result of enforcing the amendment.

Ms. King has also determined that for each year of the first five years the amendment is in effect the anticipated public benefit will be to align the rules with the statutory changes in the Texas Racing Act that occurred as a result of HB 2701, which was passed in the 80th Regular Session of the Texas Legislature.

The rules will have no adverse economic effect on small or micro-businesses because the changes continue to allow associations to pay the costs of drug testing out of money held to pay outstanding tickets and vouchers. Therefore, preparation of an economic impact statement and a regulatory flexibility analysis is not required.

There are no negative impacts upon employment conditions in this state as a result of the proposed amendments or new rules.

All comments or questions regarding the proposed amendment may be submitted in writing within 30 days following publication of this notice in the *Texas Register* to Gloria Giberson, Assistant to the Executive Director for the Texas Racing Commission, at P.O. Box 12080, Austin, Texas 78711-2080, telephone (512) 833-6699, or fax (512) 833-6907.

The amendment is proposed under the Texas Revised Civil Statutes, Article 179e, §3.02, which authorizes the Commission to make rules relating exclusively to horse and greyhound racing, and §11.01, which requires the Commission to adopt rules regulating pari-mutuel wagering on greyhound and horse racing.

The amendment implements Texas Civil Statutes, Article 179e.

§321.31. Vouchers.

Each voucher issued must have printed on its face:

(1) the name of the racetrack facility where the voucher was issued;

(2) the unique computer-generated voucher number;

(3) the date the voucher was issued;

(4) the number of the ticket-issuing machine; [~~and~~]

(5) the dollar amount of the voucher; and[~~.~~]

(6) the expiration date of the voucher.

§321.33. Expiration Date.

(a) Mutuel tickets and vouchers issued on or after September 1, 2007, shall expire at the close of business one year from date of issuance.

(b) Mutuel tickets issued during the month of August 2007 shall expire at the close of business on September 29, 2008.

(c) Mutuel tickets issued prior to August 1, 2007, have expired in accordance with the Texas Racing Act.

(d) Vouchers issued prior to September 1, 2007, shall not expire.

~~[(a) Due to the year-round nature of simulcasting and the state's fiscal year, the Commission finds a need to establish a "mutuel year" for purposes of expiration of mutuel tickets and the collection of revenue from outstanding tickets pursuant to the Act, §11.08. The mutuel year begins on August 1 and ends on July 31.]~~

~~[(b) A mutuel ticket:]~~

~~[(1) expires on the 60th day after the last day of the mutuel year in which the ticket was purchased; and]~~

~~[(2) may not be cashed by an association after the expiration date for any reason.]~~

~~[(c) A voucher has no expiration date.]~~

~~[(d) The expiration date of the wager must be printed on the face of a pari-mutuel ticket.]~~

§321.36. Remittance of Unclaimed Outs and Vouchers.

(a) Pursuant to the Act, §3.07, to pay the charges associated with the medication or drug testing, an association may use the money held by the association to pay outstanding tickets and pari-mutuel vouchers. If additional amounts are needed to pay the charges, the association shall pay those additional amounts. If the amount of outstanding tickets and pari-mutuel vouchers held exceeds the amount needed to pay the charges, the association shall pay the excess to the commission.

(b) The association shall file a quarterly report, on a form prescribed by the executive director, that reports:

(1) the amount of outstanding tickets and pari-mutuel vouchers that have expired during the quarter as outlined under §321.33;

(2) the amount needed to reimburse the association for payments made by the association to cover charges associated with the medication or drug testing pursuant to §3.07 of the Act; and

(3) the amount of excess expired tickets and pari-mutuel vouchers, if any, due to the commission.

(c) The association shall file the quarterly reports and make payments when applicable on the following schedule:

(1) September, October and November will constitute the first quarter and shall be filed with the commission no later than December 15;

(2) December, January and February will constitute the second quarter and shall be filed with the commission no later than March 15;

(3) March, April and May will constitute the third quarter and shall be filed with the commission no later than June 15; and

(4) June, July and August shall constitute the fourth quarter and shall be filed with the commission no later than September 15.

(d) The reports and payments submitted by the association are subject to audit by the Commission.

§321.37. Cashed Tickets and Vouchers.

(a) An association shall maintain facilities and use procedures that ensure the security of cashed tickets and vouchers and the integrity of records of outstanding tickets and outstanding vouchers.

(b) The association shall store cashed tickets and vouchers in a secure area.

(c) The association shall prohibit individuals other than the association's mutuel manager from having access to the cashed tickets and vouchers or to storage areas for outstanding ticket records and outstanding voucher records.

§321.41. Cashing Outstanding Tickets.

(a) For purposes of this section, an outstanding ticket is one that was purchased for a race held at least 21 [~~10~~] days before the date the ticket is presented for payment.

(b) An association shall designate one ticket window where a patron must cash an outstanding ticket. If the association needs more than one window, the association must submit a written request for approval from the executive secretary for additional windows.

(c) The association may not permit an outstanding ticket to be cashed at a ticket window other than a designated window.

(d) At the end of each race day, the mutuel manager shall deliver to the pari-mutuel auditor:

(1) a list of the outstanding tickets that were cashed on the previous race day; and

(2) a photostatic copy of each outstanding ticket cashed on the previous race day.

(e) In the event a photostatic copy can not be provided, the association will not be held liable for a reader cashed ticket if the association can produce documentation to support the ticket's existence.

§321.42. Cashing Outstanding Vouchers.

(a) For purposes of this section, an outstanding voucher is one that was issued at least 21 days before the date the voucher is presented for payment.

(b) An association shall designate one mutuel window where a patron must cash an outstanding voucher. If the association needs more than one window, the association must submit a written request for approval from the executive secretary for additional windows.

(c) The association may not permit an outstanding voucher to be cashed at a mutuel window other than a designated window.

(d) At the end of each race day, the mutuel manager shall deliver to the pari-mutuel auditor:

(1) a list of the outstanding vouchers that were cashed on the previous race day; and

(2) a photostatic copy of each outstanding voucher cashed on the previous race day.

(e) In the event a photostatic copy can not be provided, the association will not be held liable for a reader cashed voucher if the association can produce documentation to support the voucher's existence.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802072
Mark Fenner
General Counsel
Texas Racing Commission
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 833-6699

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TITLE 19. EDUCATION

PART 1. TEXAS HIGHER EDUCATION COORDINATING BOARD

CHAPTER 21. STUDENT SERVICES
SUBCHAPTER F. MATCHING SCHOLARSHIPS TO RETAIN STUDENTS IN TEXAS

19 TAC §§21.151, 21.152, 21.154

The Texas Higher Education Coordinating Board proposes amendments to §§21.151, 21.152, and 21.154, concerning the Matching Scholarships to Retain Students in Texas Program. Specifically, the proposed amendments to §21.151 (Purpose) update the title of the section to "Authority and Purpose" for consistency throughout the rules; and adds subsection (a) which references the authorizing statute for the program. Amendments to §22.152(2) (Definitions) update the citation and title for Chapter 21, Subchapter B, which deals with residency. The amendments to §21.154(1) (Eligible Students) change "Texas resident" to "resident of Texas," which corresponds with the term defined in §22.152.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be clarification of program rules. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6165, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §61.087, which provides the Coordinating Board with the authority to adopt any rules necessary to implement this section.

The amendments affect §61.087.

§21.151. Authority and Purpose.

(a) Authority for this subchapter is provided in Texas Education Code, §61.087, Matching Scholarships to Retain Students in Texas.

(b) The purpose of this program is to enable eligible institutions to use funds appropriated to it to encourage Texas students to attend college in Texas rather than go to college out of state.

§21.152. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) (No change.)

(2) Resident of Texas--A resident of the State of Texas as determined in accordance with Subchapter B of this chapter (relating to Determination of Resident Status and Waiver Programs for Certain Nonresident Persons [~~Determining Residence Status~~]). Nonresident students eligible to pay resident tuition rates are not included.

§21.154. Eligible Students.

To be eligible to receive an award through this program, a student must:

(1) be a resident of Texas [~~resident~~];

(2) - (3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802074
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: July 24, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER M. TEXAS COLLEGE WORK-STUDY PROGRAM

19 TAC §21.402, §21.404

The Texas Higher Education Coordinating Board proposes amendments to §21.402 and §21.404, concerning the Texas College Work-Study Program. Specifically, the proposed amendments to §21.402(12) (Definitions) update the citation for Chapter 21, Subchapter B, which deals with residency. The amendment to §21.404(4) (Eligible Student Employees) reflects state selective service registration requirements (Texas Education Code, §51.9095) for receiving state aid.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be clarification of program requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6165, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §56.073, which provides the Coordinating Board with

the authority to adopt any rules necessary to administer Texas Education Code, §§56.071 - 56.079, and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

The amendments affect §§56.071 - 56.079.

§21.402. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (11) (No change.)

(12) Resident of Texas--A resident of the State of Texas as determined in accordance with Subchapter B [~~§§21.727 - 21.736~~] of this chapter [~~title~~] (relating to Determination of Resident [~~Residence~~] Status and Waiver Programs for Certain Nonresident Persons). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

§21.404. Eligible Student Employees.

(a) To be eligible for employment in the general work-study program a person shall:

(1) (No change.)

(2) be enrolled for at least the number of hours required of a half-time student, and be seeking a degree or certification in an eligible institution; [~~and~~]

(3) establish financial need in accordance with Board procedures; and[~~.~~]

(4) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER AA. RECIPROCAL EDUCATIONAL EXCHANGE PROGRAM

19 TAC §21.910

The Texas Higher Education Coordinating Board proposes amendments to §21.910, concerning the Reciprocal Educational Exchange Program. Specifically, the proposed amendments to §21.910 (Reporting Requirements) eliminate the specific reporting deadline date and clarify that prior-year program data is to be reported annually by a deadline specified by the Board.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Ms. Hollis has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be clarification of program requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6165, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, Chapter 54, Subchapter B, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.060(d).

The amendments affect Texas Education Code, §54.060(d).

§21.910. Reporting Requirements.

Each [~~By October 31 of each~~] year each participating Texas institution shall provide a prior-year program report to the Board on a form provided by the Board and by a deadline specified by the Board. The report shall include such things as the number of students who have participated in the exchange program, and the names and locations of the institutions with which the exchanges have taken place. Each institution is to define, demonstrate and report the basis on which their student exchanges are reciprocal.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER BB. PROGRAMS FOR ENROLLING STUDENTS FROM MEXICO

19 TAC §21.938

The Texas Higher Education Coordinating Board proposes amendments to §21.938, concerning Programs for Enrolling Students from Mexico. Specifically, the proposed amendments to §21.938 (Reporting Requirements) eliminate the reporting deadline date, require institutions to report program data on an annual basis, and simplify the data being reported.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Ms. Hollis has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a

result of administering the section will be clarification of program requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6165, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, Chapter 54, Subchapter B, which provides the Coordinating Board with the authority to adopt any rules necessary to administer Texas Education Code, §54.060(b) and (e).

The amendments affect Texas Education Code, §54.060(b) and (e).

§21.938. Reporting Requirements.

Each [~~By October 31 of each~~] year each participating institution shall [~~may~~] provide a program report to the Board on a form provided by the Board and by a deadline specified by the Board. The report will include such information as the number of students enrolling in the institution through the program[~~, the classification of participating students, the programs of study in which the students enrolled,~~] and the amount of tuition waived.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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CHAPTER 22. GRANT AND SCHOLARSHIP PROGRAMS

SUBCHAPTER E. TEXAS NEW HORIZONS SCHOLARSHIP PROGRAM

19 TAC §22.83, §22.86

The Texas Higher Education Coordinating Board proposes amendments to §22.83 and §22.86, concerning the Texas New Horizons Scholarship Program. Specifically, the amendments to §22.83 (Eligible Students) cite the eligibility requirements for continuing in the program. This data was once housed in the General Provisions section of Chapter 22, §§22.1 - 22.8, but these sections were repealed so that the provisions could be added to individual program rules in order for the program rules to act as stand-alone documents reflecting all program requirements. House Bill 713, 76th Texas Legislature, repealed Texas Education Code, §54.216, which authorized the Texas New Horizons Scholarship Program. The program is being phased out and awards for the few remaining continuation students are funded from TEXAS Grant appropriations. The amendment to §22.86 (Funding) reflects the change in funding source for scholarship awards from an appropriation specifically for the Texas New Horizons Scholarship Program to appropriations from the TEXAS Grant Program.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be an easier understanding of program requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules to effectuate the programs under its administration.

The amendments affect no current statute since Texas Education Code, §54.216, has been repealed.

§22.83. Eligible Students.

To be eligible, a student must [~~meet the general eligibility criteria outlined in the general provisions of this chapter. In addition, the student must~~] not have received a baccalaureate degree and must not be receiving an athletic scholarship. In addition, the student must meet the following requirements:

(1) be a Texas resident as determined in accordance with Chapter 21, Subchapter B of this title (relating to Determination of Resident Status and Waiver Programs for Certain Nonresident Persons);

(2) be enrolled for at least six semester credit hours per semester or the equivalent at an eligible institution;

(3) show financial need;

(4) maintain satisfactory academic progress in his or her program of study as defined by his or her institution; and

(5) have received an award through the Texas New Horizons Scholarship Program prior to fall, 1999.

§22.86. Funding.

The costs of the scholarships authorized under this section shall be covered by appropriations for the TEXAS Grant program established by the Texas Education Code, Chapter 56, Subchapter M. [~~Out of funds appropriated for the Texas New Horizons Scholarship Program, the Commissioner shall allocate funds to eligible institutions in proportion to the unmet financial need of their students. Institutions must send to the board local or institutional funds of an amount at least equal to the amount of state funds provided. Individual student awards will be issued, with half of the funds coming from state appropriations and half from funds deposited by the institution.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER H. PROVISIONS FOR THE LICENSE PLATE INSIGNIA SCHOLARSHIP PROGRAM

19 TAC §§22.141, 22.142, 22.146, 22.147

The Texas Higher Education Coordinating Board proposes amendments to §§22.141, 22.142, 22.146, and 22.147, concerning the Provisions for the License Plate Insignia Scholarship Program. The proposed amendments to §22.141(a) (Authority and Purpose) update the citation for the authorizing statute from Texas Transportation Code, §502.270 to §504.615. The amendments to §22.146 (Allocations and Reallocations) also update the citation for the authorizing statute. The amendments to §22.142 (Definitions) update the name of the Texas Department of Transportation, formerly the State Department of Highways and Public Transportation. The amendments to §22.147 (Disbursements) change the mandatory frequency for sending funds generated through the sale of license plates to the institutions from monthly to quarterly cycles.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be clarification of program authority and requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt any rules to effectuate the programs under its administration.

The amendments affect Texas Transportation Code, §504.615.

§22.141. Authority and Purpose.

(a) Authority. Authority for this subchapter is provided in the Texas Transportation Code regarding Collegiate License Plates. These rules establish procedures to administer the subchapter as prescribed in the Texas Transportation Code, §504.615 [~~§502.270~~], generally known as the License Plate Insignia Scholarship Program.

(b) (No change.)

§22.142. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (2) (No change.)

(3) Department--Texas Department of Transportation [~~The Department of Highways and Public Transportation~~].

(4) - (5) (No change.)

§22.146. Allocations and Reallocations.

Each institution will have at its disposal the portion of funds generated through the sale of its own license plates in accordance with Texas Transportation Code, §504.615 [~~§506.270(d)~~].

§22.147. Disbursements.

Awards are to be made to eligible students at each institution in accordance with these rules and regulations.

(1) (No change.)

(2) For other public institutions. Funds will be made available to the institution through the Board. On a regular basis (at least once per quarter [~~monthly~~]), the Board will send the institution a state warrant for the amount of License Plate Insignia Scholarship funds generated through the sale of license plates and deposited by the department in the State Comptroller's Office for that institution.

(3) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER I. PROVISIONS FOR THE FIFTH-YEAR ACCOUNTING STUDENT SCHOLARSHIP PROGRAM

19 TAC §22.162, §22.164

The Texas Higher Education Coordinating Board proposes amendments to §22.162 and §22.164, concerning Provisions for the Fifth-Year Accounting Student Scholarship Program. Specifically, the amendment to §22.162(10) updates the title for Chapter 21, Subchapter B, which deals with residency. New §22.164(a)(8) adds the requirement that a student must be a resident of Texas in order to receive funds. New §22.164(a)(9) reflects state selective service registration requirements (Texas Education Code, §51.9095) for receiving state aid. The amendments to §22.164(b) provide language which enables the advisory committee to establish tighter selection criteria based on financial need, and remove Texas residency as one of the factors for selecting scholarship recipients since being a Texas resident is proposed in §22.164(a)(8) as a new eligibility requirement for receiving funds.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the sections are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the sections are in effect, the public benefit anticipated as a result of administering the sections will be an easier understanding of program requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §61.755, which authorizes the Coordinating Board to establish and administer scholarships for fifth-year accounting students, and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

The amendments affect Texas Education Code, §§61.751 - 61.758.

§22.162. Definitions.
The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (9) (No change.)

(10) Resident of Texas--A resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B[~~,~~] of this title (relating to Determination of Resident [~~Determining Residence~~] Status and Waiver Programs for Certain Nonresident Persons). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

§22.164. Eligible Students.
(a) To receive funds, a student must:

(1) - (5) (No change.)

(6) maintain a cumulative grade point average, as determined by the institution, that is equal to or greater than the grade point average required by the institution for graduation; [~~and~~]

(7) be enrolled in the additional hours of study required by Texas Occupation Code, §901.256(2)(A) (concerning Work Experience Requirements)~~;~~ [~~.~~]

(8) be a resident of Texas; and

(9) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(b) In selecting recipients the Program Officer shall consider at a minimum the following factors relating to each applicant:

(1) financial need, which acts as an upper limit to the amount the student may receive and cannot equal less than the amount calculated in keeping with the formula provided institutions in the application instructions;

(2) scholastic ability and performance as measured by the student's cumulative college grade point average as determined by the institution in which the student is enrolled; and

(3) ethnic or racial minority status. [~~; and~~]

[~~(4) Texas residency.~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 21, 2008.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Proposed date of adoption: July 24, 2008
For further information, please call: (512) 427-6114

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SUBCHAPTER N. INDIVIDUAL DEVELOPMENT ACCOUNT INFORMATION PROGRAM

19 TAC §22.280

The Texas Higher Education Coordinating Board proposes amendments to §22.280, concerning Individual Development Account Information Program. Specifically, the proposed amendments to §22.280 (Authority and Purpose) update the citation for the Individual Development Account Information Program from Texas Education Code, §61.0816 to §61.0817.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the section is in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Ms. Hollis has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be clarification of the authority for the program. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6165, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §61.0817, which provides the Coordinating Board with the authority to adopt any rules necessary to administer this section.

The amendments affect Texas Education Code, §61.0817.

§22.280. Authority and Purpose.

(a) Authority. Authority for this subchapter is provided in the Texas Education Code, Chapter 61, Subchapter C, §61.0817 [~~Chapter 61, §61.0816~~], Individual Development Account Information Program.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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For further information, please call: (512) 427-6114

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SUBCHAPTER O. EXEMPTION PROGRAM FOR CHILDREN OF PROFESSIONAL NURSING PROGRAM FACULTY AND STAFF

19 TAC §22.293, §22.295

The Texas Higher Education Coordinating Board proposes amendments to §22.293 and §22.295 concerning the Exemption Program for Children of Professional Nursing Program Faculty and Staff. Specifically, the amendment to §22.293(7) (Definitions) updates the citation and title for Chapter 21, Subchapter B, which deals with residency. The amendments to §22.295 (Eligible Students) reflect state selective service registration requirements (Texas Education Code §51.9095) for receiving state aid.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of administering the sections will be an easier understanding of program requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §54.221, which provides the Coordinating Board with the authority to adopt rules governing the granting or denial of an exemption under this section, including rules relating to the determination of eligibility for an exemption; and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

The amendments affect Texas Education Code, §54.221.

§22.293. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (6) (No change.)

(7) Resident of Texas--a resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B [~~Sections 21.21 - 21.27~~], of this title (relating to Determination of Resident [~~Determining Residence~~] Status and Waiver Programs for Certain Nonresident Persons). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

(8) - (9) (No change.)

§22.295. Eligible Students.

(a) To receive an award through the Exemption Program for Children of Professional Nursing Faculty and Staff, a student shall:

(1) - (4) (No change.)

(5) be enrolled at the same institution of higher education at which the student's parent is currently employed or with which the parent has contracted, either as a professional nursing faculty or staff member; and[~~.~~]

(6) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from Selective Service registration under federal law.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER P. EXEMPTION PROGRAM FOR CLINICAL PRECEPTORS AND THEIR CHILDREN

19 TAC §§22.303, 22.305, 22.306

The Texas Higher Education Coordinating Board proposes amendments to §§22.303, 22.305, and 22.306 concerning the Exemption Program for Clinical Preceptors and Their Children. Specifically, the amendment to §22.303(7) (Definitions) updates the citation and title for Chapter 21, Subchapter B, which deals with residency. Amendments to §22.305(4) (Eligible Preceptors) and §22.306(4) (Eligible Children) reflect state selective service registration requirements (Texas Education, §51.9095) for receiving state aid. In addition, §22.306(2) references the specific requirements that preceptors must meet for their children to qualify for the exemption.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance, has determined that for each year of the first five years the amendments are in effect, there will be no fiscal implications to state or local government as a result of enforcing or administering the rules.

Ms. Hollis has also determined that for each year of the first five years the amendments are in effect, the public benefit anticipated as a result of administering the sections will be clarification of program requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules to effectuate the programs under its administration, and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

The amendments affect Texas Education Code, §54.222.

§22.303. Definitions.

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise:

(1) - (6) (No change.)

(7) Resident of Texas--a resident of the State of Texas as determined in accordance with Chapter 21, Subchapter B [~~Sections 21.21 - 21.27~~] of this title (relating to Determination of Resident Status and Waiver Programs for Certain Nonresident Persons [~~Determining Residence Status~~]). Nonresident students who are eligible to pay resident tuition rates are not residents of Texas.

(8) - (9) (No change.)

§22.305. Eligible Preceptors.

To receive an exemption under this program, a preceptor must:

(1) - (2) (No change.)

(3) serve, on an average, at least one day per week under a written preceptor agreement with an undergraduate professional nursing program as a clinical preceptor for students enrolled in the program for:

(A) (No change.)

(B) the time period the program conducts clinicals during a semester or other academic term that ended less than one year prior to the beginning of the semester or term in which the exemption is to be used; and[~~,~~]

(4) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from selective service registration under federal law.

§22.306. Eligible Children.

To receive an exemption under this program, a child must:

(1) (No change.)

(2) be the child of a clinical preceptor as described in §22.305(1) - (3) of this title (relating to Eligible Preceptors) whether or not the preceptor is receiving or has received an exemption based on the same period of service; [~~and~~]

(3) be enrolled as an undergraduate student; and[~~,~~]

(4) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from selective service registration under federal law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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SUBCHAPTER Q. ENGINEERING SCHOLARSHIP PROGRAM

19 TAC §22.315

The Texas Higher Education Coordinating Board proposes amendments to §22.315, concerning the Engineering Scholarship Program. Specifically, the amendments to §22.315 (Student Eligibility Requirements) reflects state selective service registration requirements (Texas Education Code, §51.9095) for receiving state aid.

Ms. Lois Hollis, Special Assistant to the Deputy Commissioner for Business and Finance has determined that for each year of the first five years the section is in effect there will be no fiscal implications to state or local government as a result of enforcing or administering the rule.

Ms. Hollis has also determined that for each year of the first five years the section is in effect, the public benefit anticipated as a result of administering the section will be clarification of program requirements. There is no effect on small businesses. There are no anticipated economic costs to persons who are required to comply with the section as proposed. There is no impact on local employment.

Comments on the proposal may be submitted to Lois Hollis, P.O. Box 12788, Austin, Texas 78711, (512) 427-6465, lois.hollis@thecb.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

The amendments are proposed under the Texas Education Code, §61.027, which provides the Coordinating Board with the authority to adopt rules to effectuate the programs under its administration, and §51.9095, which authorizes the Coordinating Board to adopt rules regarding student compliance with selective service registration.

The amendments affect Texas Education Code, §61.027.

§22.315. Student Eligibility Requirements.

(a) To qualify for an engineering scholarship, a person must:

(1) - (2) (No change.)

(3) enroll in an undergraduate engineering program offered by a general academic teaching institution in Texas; [~~and~~]

(4) maintain an overall grade point average of at least 3.0 on a four-point scale at the institution in which the engineering student is enrolled; and [~~,~~]

(5) have a statement on file with the institution of higher education indicating the student is registered with the Selective Service System as required by federal law or is exempt from selective service registration under federal law.

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Bill Franz
General Counsel
Texas Higher Education Coordinating Board
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PART 2. TEXAS EDUCATION AGENCY

CHAPTER 103. HEALTH AND SAFETY SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING PHYSICAL FITNESS

19 TAC §103.1003

The Texas Education Agency proposes new §103.1003, concerning student physical activity requirements and exemptions. The proposed new section would implement the requirements of the Texas Education Code (TEC), §28.002, as amended by Senate Bill (SB) 530, 80th Texas Legislature, 2007, which requires that school districts and open-enrollment charter schools require physical activity in Kindergarten-Grade 8 and allow for appropriate exemptions.

Through SB 530, the 80th Texas Legislature amended the TEC, §28.002, requiring school districts to ensure that students in Kindergarten-Grade 8 participate in moderate to vigorous physical activity for at least 30 minutes daily. The TEC, §28.002(l) and (l-1), authorize the commissioner of education to provide exemptions for alternative extracurricular and other structured activities to meet the physical activity requirement.

Proposed new 19 TAC Chapter 103, Health and Safety, Subchapter BB, Commissioner's Rules Concerning Physical Fitness, §103.1003, Student Physical Activity Requirements and Exemptions, would implement the TEC, §28.002(l) and (l-1), by specifying options for exemptions at the district level to meet the physical activity requirements in certain grade levels. The proposed new rule would include exemptions for health classifications, an extracurricular activity, a school-related activity, or an activity sponsored by a private league or club. The proposal would also provide a definition for structured activity.

Jeff Kloster, Associate Commissioner for Health and Safety, has determined that for the first five-year period the new section is in effect there will be no fiscal implications for state or local government as a result of enforcing or administering the new section.

Mr. Kloster has determined that for each year of the first five years the new section is in effect the public benefit anticipated as a result of enforcing the new section would be an increase in public awareness of quality physical education programs and an emphasis on the importance of community and school-based support of school health programming. The proposal would also strengthen physical education and physical activity programs to ensure health improvement among the student population, including a gradual reduction in childhood obesity and Type II diabetes. There is no anticipated economic cost to persons who are required to comply with the proposed new section.

There is no adverse economic impact to small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period on the proposal begins May 2, 2008, and ends June 1, 2008. Comments on the proposal may be submitted to Cristina De La Fuente-Valadez, Policy Coordination Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701, (512) 475-1497. Comments may also be submitted electronically to *rules@tea.state.tx.us* or faxed to (512) 463-0028. All requests for a public hearing on the proposal submitted under the Administrative Procedure Act must be received by the commissioner of education not more than 15 calendar days after notice of the proposal has been published in the *Texas Register* on May 2, 2008.

The new section is proposed under the Texas Education Code, §28.002(l) and (l-1), which authorize the commissioner of education to adopt rules to provide exemptions for alternative extracurricular and other structured activities to meet the physical activity requirement. Texas Education Code, §28.002(l), requires that school districts and open-enrollment charter schools require physical activity in Kindergarten-Grade 8 and allow for appropriate exemptions.

The new section implements the Texas Education Code, §28.002(l) and (l-1).

§103.1003. Student Physical Activity Requirements and Exemptions.

(a) In accordance with the Texas Education Code (TEC), §28.002(l), all students in Kindergarten-Grade 8 must participate in at least 30 minutes of moderate to vigorous daily physical activity subject only to the limitations or exemptions specified in this section.

(1) For a student enrolled in any grade level below Grade 6, the school district or open-enrollment charter school may require a student to participate in moderate or vigorous physical activity for at least 135 minutes during each school week as an alternative.

(2) A student in Grade 6, 7, or 8 must participate daily for at least four semesters during those grades.

(3) A school district or open-enrollment charter school that uses block scheduling may permit a student to participate in 225 minutes of physical activity over two weeks as an alternative.

(4) Each school district or open-enrollment charter school must allow an exemption from the physical activity requirement for a student with an illness or a disability using the health classifications defined in §74.31 of this title (relating to Health Classifications for Physical Education).

(b) Each school district or open-enrollment charter school must provide an exemption for a student on a middle or junior high school campus to participate in an extracurricular activity that has a moderate to vigorous physical activity component and meets the requirements for extracurricular activity as defined by §76.1001 of this title (relating to Extracurricular Activities) and is a structured activity as defined by subsection (d) of this section.

(c) A school district or open-enrollment charter school may allow an exemption for a student on a middle or junior high school campus participating in a school-related activity or an activity sponsored by a private league or club only if that activity meets each of the following requirements.

(1) The activity must be structured as defined in subsection (d) of this section.

(2) The school district's board of trustees or open-enrollment charter school board must certify the activity.

(3) The student must provide proof of participation in the activity.

(d) A structured activity as referenced in this section is defined as an activity that meets, at a minimum, each of the following requirements.

(1) The activity is based on the grade appropriate movement, physical activity and health, and social development strands of the essential knowledge and skills for physical education specified in Chapter 116 of this title (relating to Texas Essential Knowledge and Skills for Physical Education).

(2) The activity is organized and monitored by school personnel or by appropriately trained instructors who are part of a program that has been certified by the school district's board of trustees or open-enrollment charter school board.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802068
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 213. PRACTICE AND PROCEDURE

22 TAC §213.12

The Texas Board of Nursing (BON) proposes an amendment to 22 Texas Administrative Code §213.12 regarding Witness Fees and Expenses. The proposed amendment to §213.12 is to allow a witness who has been subpoenaed by the Board or a party to a proceeding of the Board's to receive adequate reimbursement for their mileage. The rule was recently amended to increase the reimbursement rate to 48.5¢ for each mile, but due to the rising cost of fuel, the reimbursement rate allowed by the IRS has been increased again to 50.5¢. The Board proposes to amend the rule to allow the reimbursement rate to be tied to the federal income tax regulations reimbursement rate, so that the rule does not have to be constantly amended.

Katherine Thomas, executive director, has determined that for the first five-year period the proposed amendments are in effect there will be no fiscal implications for state or local government as a result of implementing the proposed amendments except the agency will incur any additional expenses for witness fees.

Katherine Thomas, executive director, has determined that for each year of the first five years the proposal is in effect, the public benefit is that witnesses subpoenaed by the Board will be more adequately and fairly compensated for any expenses they may incur. There will be no additional cost to small businesses or affected individuals as a result of these proposed amendments.

Written comments on the proposal may be submitted to Joy Sparks, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701; by email to joy.sparks@bon.state.tx.us; or by facsimile to (512) 305-8101.

The proposal is pursuant to the authority of Texas Occupations Code §301.151 and §301.152 that authorize the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

This proposal will affect Texas Occupations Code §301.465 regarding Subpoenas; Request for Information.

§213.12. Witness Fees and Expenses.

A witness who is not a party to the proceeding and who is subpoenaed to appear at a deposition or hearing or to produce books, papers, or other objects, shall be entitled to receive reimbursement for expenses incurred in complying with the subpoena as set by the legislature in the APA, Texas Government Code Annotated §2001.103. In addition, a subpoenaed witness is entitled to thirty dollars ($30) for each day or part of a day that the person is necessarily present, and to mileage reimbursement. The mileage reimbursement rate shall be equal to the maximum fixed mileage allowance specified in the revenue rulings issued by the Internal Revenue Service under the federal income tax regulations as announced by the Texas Comptroller [~~48.5 cents for each mile~~] for going to and returning from the place of the hearing or deposition if the place is more than 25 miles from the person's place of residence, and the person uses the person's personally owned or leased motor vehicle for the travel.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802056
Katherine Thomas
Executive Director
Texas Board of Nursing
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 305-6823

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CHAPTER 223. FEES

22 TAC §223.1

The Texas Board of Nursing proposes an amendment to 22 Texas Administrative Code §223.1 regarding Fees. The Board proposes to reduce the renewal fees for Registered and Vocational Nurses from $67 to $65 (RNs) and from $58 to $55 (LVNs) due to a $4.75 reduction in the fee for an FBI fingerprint-based criminal background check and the increased income from a higher number of RNs and LVNs renewing their licenses. Any excess funds collected from licensees go into the general revenue fund. The proposed amendment reflects this reduction.

Katherine Thomas, executive director, has determined that for the first five-year period the proposed amendments are adopted there will be no fiscal implications for state or local government as a result of implementing the proposed amendments.

Katherine Thomas, executive director, has determined that for each year of the first five years the proposed amendments are adopted, the public benefit will be that nurse licensees will have reduced license renewal fees. There will be no effect on small businesses.

Written comments on the proposal may be submitted by mail to Joy Sparks, Assistant General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701; by email to joy.sparks@bon.state.tx.us; or by facsimile to (512) 305-8101.

The proposed amendments of this chapter are pursuant to the authority of Texas Occupations Code §301.151 and §301.152 which authorize the Texas Board of Nursing to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

§223.1. Fees.

(a) The Texas Board of Nursing has established reasonable and necessary fees for the administration of its functions.

(1) - (2) (No change.)

(3) Licensure renewal (each biennium):

(A) Registered Nurse (RN): $65; [~~$67;~~] and

(B) Licensed Vocational Nurse (LVN): $55; [~~$58;~~]

(4) - (23) (No change.)

(b) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802055
Katherine Thomas
Executive Director
Texas Board of Nursing
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 305-6823

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PART 17. TEXAS STATE BOARD OF PLUMBING EXAMINERS

CHAPTER 361. ADMINISTRATION

SUBCHAPTER A. GENERAL PROVISIONS

22 TAC §361.1

The Texas State Board of Plumbing Examiners (Board) proposes amendments to §361.1, Definitions, which provides the meanings of words and terms used in the Plumbing License Law and Board Rules.

The amendments to §361.1 are proposed to define the term "new construction", as used in the Plumbing License Law, Subchapter B, Exemptions, §1301.052, Work Inside or Outside Municipalities. Subchapter B provides for certain plumbing related acts which may be performed without a license issued by the Board. Section 1301.052 describes certain geographical areas of the state where a license is not required. Section 1301.052 sets aside plumbing work performed in conjunction with new construction as not being exempted from licensure requirements, but work which requires a license regardless of the geographic area in which the work is performed.

The purpose of adopting the new amendments is to provide clarity to persons who have asked the meaning of the term "new construction", as used in this section. Section 1301.052 states:

"§1301.052. WORK INSIDE OR OUTSIDE MUNICIPALITIES.

A person is not required to be licensed under this chapter to perform plumbing, other than plumbing performed in conjunction with new construction, on a property that is:

(1) located in a subdivision or on a tract of land that is not required to be platted under §232.0015, Local Government Code; or

(2) not connected to a public water system and is located outside a municipality, or

(3) located outside a municipality and connected to a public water system that does not require a license to perform plumbing; or

(4) inside a municipality with fewer than 5,000 inhabitants, unless an ordinance of the municipality requires the person to be licensed."

The proposed amendments will continue to allow unlicensed persons who are exempted under §§1301.052(1) - 1301.052(4) to repair or remodel plumbing which is not performed in conjunction with new construction.

The new amendments clarify that new construction includes the addition of a permanent building or structure to property. The term "permanent" is used in the usual context to mean "lasting or intended to last indefinitely without change, as opposed to temporary." The International Plumbing Code (IPC), which is required to be adopted by the Board under §1301.255 of the Plumbing License Law, defines "Building" as "Any structure occupied or intended for supporting or sheltering any occupancy." The IPC defines "Structure" as "That which is built or constructed or a portion thereof."

The new amendments also clarify that new construction includes an addition or alteration to an existing building which increases the total square footage of the building or structure or changes the purpose for which the building or structure, or a portion thereof, is utilized or occupied. This language is consistent with the manner in which the IPC defines "Occupancy." The IPC defines "Occupancy" as "The purpose for which a building or portion thereof is utilized or occupied."

Economic Impact Statement, Regulatory Flexibility Analysis and Public Benefit. Based on the number of Certificates of Insurance filed with the Board by licensed Master Plumbers, the Board estimates that there are approximately 5,500 plumbing companies in the state which use licensed plumbers. The Board estimates that the majority of these are small businesses and many are micro businesses with no more than one or two employees. Because the amendments to §361.1 do not change the exemptions provided by Subchapter B of the Plumbing License Law, the projected economic impact on these small and micro businesses should be neutral. The Board does not register or have any reporting requirements for persons who engage in plumbing without a license due to the exemptions provided by §1301.052, of the Plumbing License Law. However, the Board estimates the number of those businesses which perform plumbing as a regular occupation, legally without a license, to be less than 200 statewide. The Board estimates that most all of these are micro businesses with one or two employees. Because the amendments to §361.1 do not change the exemptions provided to these unlicensed businesses by Subchapter B of the Plumbing License Law, the projected economic impact on these small and micro businesses should be neutral. In preparing this proposed rule, the Board considered several alternative methods for achieving the purposes of this rule amendment. The Board considered not defining "new construction", but decided that, based on the number of inquiries received, the public and the plumbing industry would benefit from clearer standards. The Board considered not including the word "permanent" in §361.1(31)(A) of the proposed rule, but decided that the inclusion of temporary buildings and

structures would be more restrictive than the intent of §1301.052, for example, by including portable or mobile homes used temporarily on hunting or fishing camps or in similar situations. The Board considered not including the language in §361.1(31)(B)(i), but decided that such an addition or alteration to an existing building or structure which increased the total square footage could not be performed without new construction. The Board considered not including the language in §361.1(31)(B)(ii), but decided that such an addition or alteration which changes occupancy or a portion thereof would include, for example, a building or structure previously constructed without a finished interior, which requires new construction in order for the building or structure to be completed and occupied. Additionally, such an addition or alteration which changes the purpose for which the building or structure, or a portion thereof is utilized or occupied, would include, for example, a building or structure originally constructed as a single-family residence which requires new construction in order to convert it to a restaurant, healthcare facility, medical facility, or other type of business.

The public benefits of adopting the proposed definition will be that the plumbing industry will better protect the health and safety of the public when following these clearer standards.

Comments on the proposed rule changes, including the Economic Impact Statement, Regulatory Flexibility Analysis and Public Benefit, may be submitted within 30 days of publication of these proposed rule amendments in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §361.1 are proposed under and affect Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), §§1301.251, 1301.052, 1301.255 and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.052 provides certain geographic exemptions for persons who do not hold a license issued by the Board. Section 1301.255 requires the Board to adopt certain plumbing codes, including the International Plumbing Code. The amendments to §361.1 are also proposed under Texas Government Code §2006.002, as amended by the 80th Legislature, HB 3430, which requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses.

No other statute, article or code is affected by this proposed amendment.

§361.1. Definitions.

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

(1) Act--The Plumbing License Law, Title 8, Chapter 1301, Occupations Code, as amended.

(2) Administrative Act--The Administrative Procedure Act, the Texas Government Code, §2001.001, et seq, as amended.

(3) Administrator--The Board-appointed executive director of all Board staff.

(4) Adopted Plumbing Code--A plumbing code, including a fuel gas code adopted by the Board or a political subdivision, including any city, town, village, municipality, public water system, municipal utility district, in compliance with §1301.255 and §1301.551 of the Plumbing License Law.

(5) Advisory Committee--A Board appointed committee subject to §1301.258 of the Plumbing License Law, §361.12 of these rules and Chapter 2110 of the Government Code, of which the primary function is to advise the Board.

(6) Appliance Connection--An appliance connection procedure using only a code approved appliance connector that does not require cutting into or altering the existing plumbing system.

(7) Applicant--An individual seeking to obtain a License, Registration or Endorsement.

(8) Board--The Texas State Board of Plumbing Examiners.

(9) Board Member--An individual appointed by the governor and confirmed by the senate to serve on the Board.

(10) Building Sewer--The part of the sanitary drainage system outside of the building, which extends from the end of the building drain to a public sewer, private sewer, private sewage disposal system, or other point of sewage disposal.

(11) Certificate of Insurance--a form submitted to the Board certifying that the Responsible Master Plumber carries insurance coverage as specified in §1301.522 of the Plumbing License Law and §367.3 of these Rules.

(12) Chief Examiner--an employee of the Board who, under the direction of the Administrator, coordinates and supervises the activities of the Board examinations and registrations.

(13) Chief Field Representative--the Director of Enforcement who is an employee of the Board who meets the definition of "Field Representative" and, under the direction of the Executive Director, coordinates and supervises the activities of the Field Representatives.

(14) Cleanout--A fitting, other than a p-trap, approved by the adopted plumbing code and designed to be installed in a sanitary drainage system to allow easy access for cleaning the sanitary drainage system.

(15) Code-Approved Appliance Connector--A semi-rigid or flexible assembly of tube and fittings approved by the adopted plumbing code and designed for connecting an appliance to the existing plumbing system without cutting into or altering the existing plumbing system.

(16) Code Approved Existing Opening--For the purposes of drain cleaning activities described in §1301.002(3) of the Plumbing License Law, a code approved existing opening is any existing cleanout fitting, inlet of any p-trap or fixture, or vent terminating into the atmosphere that has been approved and installed in accordance with the adopted plumbing code.

(17) Complaint--A written charge alleging a violation of state law, Board rules or orders, local codes or ordinances, or standards of competency; or the presence of fraud, false information, or error in the attempt to obtain a License, Registration or Endorsement.

(18) Contested Case--A proceeding, including but not limited to rulemaking, licensing and registering, in which the agency determines the legal right, duties, and privileges of a party after allowing an opportunity for adjudicative hearing of the case.

(19) Continuing Professional Education--Board-approved courses/programs required for a licensee to renew his or her License and/or Endorsement.

(20) Direct Supervision--

(A) The on-the-job oversight and direction of a Registered Plumber's Apprentice performing plumbing work by a licensed plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(i) that the plumbing materials for the job are properly prepared prior to assembly according to the material manufacturers recommendations and the requirements of the adopted plumbing code; and

(ii) that the plumbing work for the job is properly installed to protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(B) The on-the-job oversight and direction by a licensed Plumbing Inspector of an individual training to qualify for the Plumbing Inspector Examination.

(C) For plumbing work performed only in the construction of a new one-family or two-family dwelling in an unincorporated area of the state, a Responsible Master Plumber is not required to provide for the continuous or uninterrupted on-the-job oversight of a Registered Plumber's Apprentice's work by a licensed plumber, however, the Responsible Master Plumber must:

(i) provide for the training and management of the Registered Plumber's Apprentice by a licensed plumber;

(ii) provide for the review and inspection of the Registered Plumber's Apprentice's work by a licensed plumber to ensure compliance with subparagraph (A)(i) and (ii) of this paragraph; and

(iii) upon request by the Board, provide the name and plumber's license number of the licensed plumber who is providing on-the-job training and management of the Registered Plumber's Apprentice and who is reviewing and inspecting the Registered Plumber's Apprentice's work on the job, or the name and plumber's license number of the licensed plumber who trained and managed the Registered Plumber's Apprentice and who reviewed and inspected the Registered Plumber's Apprentice's work on a job.

(21) Drain Cleaner--An individual who has completed at least 4,000 hours working under the supervision of a Master Plumber as a registered Drain CleanerRestricted Registrant, who has fulfilled the requirements of and is registered with the Board, and who installs cleanouts and removes and resets ptraps to eliminate obstructions in building drains and sewers.

(22) Drain Cleaner-Restricted Registrant--An individual who has worked as a registered Plumber's Apprentice under the supervision of a Master Plumber, who has fulfilled the requirements of and is registered with the Board, and who clears obstructions in sewer and drain lines through any codeapproved existing opening.

(23) Endorsement--a certification issued by the Board in addition to the Master or Journeyman Plumber License.

(24) Field Representative--for the purposes of these Rules,

(A) "Field Representative" means an employee of the Board who is:

(i) knowledgeable of this Act and of municipal ordinances relating to plumbing;

(ii) qualified by experience and training in good plumbing practice and compliance with this Act;

(iii) designated by the Board to assist in the enforcement of this Act and rules adopted under this Act.

(B) A field representative may:

(i) Make on-site license and registration checks to determine compliance with this Act;

(ii) investigate consumer complaints filed under §1301.303 of the Plumbing License Law;

(iii) assist municipal plumbing inspectors in cooperative enforcement of this Act; and

(iv) issue citations as provided by §1301.502 of the Plumbing License Law.

(25) Journeyman Plumber--An individual licensed under this Act who has met the qualifications for registration as a Plumber's Apprentice or for licensure as a Tradesman Plumber-Limited Licensee, who has completed at least 8,000 hours working under the supervision of a master plumber, who supervises, engages in, or works at the actual installation, alteration, repair, service and renovating of plumbing, and who has successfully fulfilled the examinations and requirements of the Board.

(26) License--A document issued by the Board to certify that the named individual fulfilled the requirements of the Act and of these rules to hold a license issued by the Board.

(27) Licensing and Registering--The process of granting, denying, renewing, revoking, or suspending a License, Registration or Endorsement.

(28) Maintenance Man or Maintenance Engineer--An employee, as opposed to an independent contractor, who performs plumbing maintenance work incidental to and in connection with other duties. "Incidental to and in connection with" includes the repair, maintenance and replacement of existing potable water piping, existing sanitary waste and vent piping, existing plumbing fixtures and existing water heaters. "Incidental to and in connection with" does not include cutting into fuel gas plumbing systems and the installation of gas fueled water heaters. An individual who erects, builds, or installs plumbing not already in existence may not be classified as a maintenance man or maintenance engineer. Plumbing work performed by a maintenance man or maintenance engineer is not exempt from state law and municipal rules and ordinances regarding plumbing codes, plumbing permits and plumbing inspections. Such maintenance individuals shall not engage in plumbing work for the general public.

(29) Master Plumber--An individual licensed under this Act who is skilled in the planning, superintending, and the practical installation, repair, and service of plumbing, who secures permits for plumbing work, who is knowledgeable about the codes, ordinances, or rules and regulations governing those matters, who alone, or through an individual or individuals under his supervision, performs plumbing work, and who has successfully fulfilled the examinations and requirements of the Board.

(30) Medical Gas Piping Installation Endorsement--a document entitling the holder of a Master or Journeyman Plumber License to install piping that is used solely to transport gases used for medical purposes including, but not limited to oxygen, nitrous oxide, medical air, nitrogen, medical vacuum.

(31) New Construction--as used in §1301.052 of the Plumbing License Law includes:

(A) The addition of a permanent building or structure to property; or

(B) An addition or alteration to an existing building or structure which

(i) increases the total square footage of the building or structure; or

(ii) changes the purpose for which the building or structure, or a portion thereof, is utilized or occupied.

(32) [~~(31)~~] One Family Dwelling--a detached structure designed for the residence of a single family that does not have the characteristics of a multiple family dwelling, and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(33) [~~(32)~~] Party--Each person named or admitted in association with an action as a party.

(34) [~~(33)~~]Paid Directly--As related to §1301.255(e) of the Plumbing License Law, "paid" and "directly" have the common meanings and "paid directly" means that compensation for plumbing inspections must be paid by the political subdivision to the individual Licensed Plumbing Inspector who performed the plumbing inspections or the plumbing inspection business which utilized the plumbing inspector to perform the inspections.

(35) [~~(34)~~] Person--For the purposes of these Rules only, a person means an individual, partnership, corporation, limited liability company, association, governmental subdivision or public or private organization of any character other than an agency.

(36) [~~(35)~~] Petitioner--A person asking the Board to adopt a rule.

(37) [~~(36)~~] Plumber's Apprentice--any individual other than a Master Plumber, Journeyman Plumber, or Tradesman Plumber-Limited Licensee who, as his or her principal occupation, is engaged in learning and assisting in the installation of plumbing, is registered by the Board, and works under the supervision of a licensed Master Plumber and the direct supervision of a licensed plumber.

(38) [~~(37)~~] Plumbing--All piping, fixtures, appurtenances, and appliances, including disposal systems, drain or waste pipes, or any combination of these that: supply, recirculate, drain, or eliminate water, gas, medical gasses and vacuum, liquids, and sewage for all personal or domestic purposes in and about buildings where persons live, work, or assemble; connect the building on its outside with the source of water, gas, or other liquid supply, or combinations of these, on the premises, or the water main on public property; and carry waste water or sewage from or within a building to the sewer service lateral on public property or the disposal or septic terminal that holds private or domestic sewage. The installation, repair, service, maintenance, alteration, or renovation of all piping, fixtures, appurtenances, and appliances on premises where persons live, work, or assemble that supply gas, medical gasses and vacuum, water, liquids, or any combination of these, or dispose of waste water or sewage.

(39) [~~(38)~~] Plumbing Company--A person, as defined in these Rules, who engages in the plumbing business.

(40) [~~(39)~~] Plumbing Inspection--Any of the inspections required in §1301.255 and §1301.551 of the Plumbing License Law, including any check of pipes, faucets, tanks, valves, water heaters, plumbing fixtures and appliances by and through which a supply of water, gas, medical gasses or vacuum, or sewage is used or carried that is performed on behalf of any political subdivision, public water supply, municipal utility district, town, city or municipality to ensure compliance with the adopted plumbing and gas codes and ordinances regulating plumbing.

(41) [~~(40)~~] Plumbing Inspector--means any individual who is employed by a political subdivision, or who contracts as an independent contractor with a political subdivision, for the purpose of inspecting plumbing work and installations in connection with health and safety laws, ordinances, and plumbing and gas codes, who has no financial or advisory interests in any plumbing company, and who has successfully fulfilled the examinations and requirements of the Board.

(42) [~~(41)~~] Pocket Card--A card issued by the Board which certifies that the holder has a Master Plumber License, Journeyman Plumber License, Tradesman Plumber-Limited License, Plumbing Inspector License, Residential Utilities Installer Registration, Drain Cleaner Registration, Drain Cleaner-Restricted Registration or a Plumber's Apprentice Registration.

(43) [~~(42)~~] Political Subdivision--A political subdivision of the State of Texas that includes a:

(A) city;

(B) county;

(C) school district;

(D) junior college district;

(E) municipal utility district;

(F) levee improvement district;

(G) drainage district;

(H) irrigation district;

(I) water improvement district;

(J) water control improvement district;

(K) water control preservation district;

(L) freshwater supply district;

(M) navigation district;

(N) conservation and reclamation district;

(O) soil conservation district;

(P) communication district;

(Q) public health district;

(R) river authority; and

(S) any other governmental entity that:

(i) embraces a geographical area with a defined boundary;

(ii) exists for the purpose of discharging functions of government and;

(iii) possesses authority for subordinate self government through officers selected by it.

(44) [~~(43)~~] P-Trap--A fitting connected to the sanitary drainage system for the purpose of preventing the escape of sewer gasses from the sanitary drainage system and designed to be removed to allow for cleaning of the sanitary drainage system. For the purposes of drain cleaning activities described in §1301.002(2) of the Plumbing License Law, a p-trap includes any integral trap of a water closet, bidet, or urinal.

(45) [~~(44)~~] Public Water System--A system for the provision to the public of water for human consumption through pipes or other constructed conveyances. Such a system must have at least 15 service connections or serve at least 25 individuals at least 60 days out of the year. Two or more systems with each having a potential to serve less than 15 connections or less than 25 individuals, but owned by the same person, firm, or corporation and located on adjacent land will be

considered a public water system when the total potential service connections in the combined systems are 15 or greater or if the total number of individuals served by the combined systems total 25 or greater, at least 60 days out of the year. Without excluding other meanings of the terms "individual" or "served," an individual shall be deemed to be served by a water system if the individual lives in, uses as the individual's place of employment, or works in a place to which drinking water is supplied from the water system.

(46) [~~(45)~~] Regularly Employed--Steadily, uniformly, or habitually working in an employer-employee relationship with a view of earning a livelihood, as opposed to working casually or occasionally.

(47) [~~(46)~~] Residential Utilities Installer--means an individual who has completed at least 2,000 hours working under the supervision of a Master Plumber as a registered Plumber's Apprentice, who has fulfilled the requirements of and is registered with the Board, and who constructs and installs yard water service piping for onefamily or twofamily dwellings and building sewers.

(48) [~~(47)~~] Respondent--A person charged in a complaint filed with the Board.

(49) [~~(48)~~] Responsible Master Plumber--A Responsible Master Plumber is the Master Plumber who allows his Master Plumber License to be used by a company for the purpose of performing plumbing work and obtaining the required plumbing permits. The Master Plumber by allowing his license to be used in this manner, assumes responsibility for all plumbing work performed. A Responsible Master Plumber may allow his Master Plumber License to be used by only one plumbing company.

(50) [~~(49)~~] Rule--An agency statement of general applicability that implements, interprets, or prescribes law or policy, or describes the procedure or practice requirements of the agency. The term includes the amendment or repeal of a prior rule but does not include statements concerning only the internal management or organization of the agency and not affecting private rights or procedures.

(51) [~~(50)~~] Supervision--the general on-the-job or off-the-job oversight, direction and management of plumbing work and individuals performing plumbing work by a Responsible Master Plumber who is fulfilling his or her responsibility to the client and employer by ensuring the following:

(A) that the operations of the plumbing company that has secured his or her services meets the requirements of all applicable local and state ordinances, regulations and laws; and

(B) that the plumbing work performed under his or her License will protect health and safety by meeting the requirements of the adopted plumbing code and all requirements of local and state ordinances, regulations and laws.

(52) [~~(51)~~] System--An interconnection between one or more public or private end users of water, gas, sewer, or disposal systems that could endanger public health if improperly installed.

(53) [~~(52)~~] Tradesman Plumber-Limited Licensee--means an individual who has completed at least 4,000 hours working under the direct supervision of a Journeyman or Master Plumber as a registered Plumber's Apprentice, who has passed the required examination and fulfilled the other requirements of the Board, who constructs and installs plumbing for one-family or two-family dwellings, and who has not met or attempted to meet the qualifications for a Journeyman Plumber License.

(54) [~~(53)~~] Two Family Dwelling--a detached structure with separate means of egress designed for the residence of two families ("duplex") that does not have the characteristics of a multiple family dwelling and is not primarily designed for transient guests or for providing services for rehabilitative, medical, or assisted living in connection with the occupancy of the structure.

(55) [~~(54)~~]Water Supply Protection Specialist--a Master or Journeyman Plumber who holds the Water Supply Protection Specialist Endorsement issued by the Board.

(56) [~~(55)~~]Water Treatment--A business conducted under contract that requires experience in the analysis of water, including the ability to determine how to treat influent and effluent water, to alter or purify water, and to add or remove a mineral, chemical, or bacterial content or substance. The term also includes the installation and service of potable water treatment equipment in public or private water systems and making connections necessary to complete installation of a water treatment system.

(57) [~~(56)~~] Work as a Master Plumber--To act as and assume the responsibilities of a Responsible Master Plumber, as defined in these Rules.

(58) [~~(57)~~] Yard Water Service Piping--The building supply piping carrying potable water from the water meter or other source of water supply to the point of connection to the water distribution system at the building.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2008.

TRD-200802015
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 936-5224

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CHAPTER 367. ENFORCEMENT

22 TAC §367.1

The Texas State Board of Plumbing Examiners (Board) proposes amendments to §367.1, General Provisions, which sets forth the plumbing codes adopted by the Board. Currently, the Board has adopted the Uniform Plumbing Code, as published by the International Association of Plumbing and Mechanical Officials (UPC) and the International Plumbing Code, as published by the International Code Council (IPC). As specified by §1301.255(a) of the Plumbing License Law (Title 8, Chapter 1301, Occupations Code), the Board has adopted the two codes as they existed on May 31, 2001, which are the 2000 editions of both codes. Section 1301.255(b) of the Plumbing License Law authorizes the Board to adopt later editions of the two codes.

Each edition of the plumbing codes are continually reviewed by a wide diversity of industry experts. The result is a new edition of the codes being published approximately every three years, ensuring that proper installation of plumbing systems will better protect public health and safety.

The amendments to §367.1 are proposed in response to a petition from Jack D. Burleson, Regional Manager, Governmental Relations, International Code Council (ICC), requesting the Board to adopt the latest editions of the codes, which are the

2006 Uniform Plumbing Code and the 2006 International Plumbing Code. The Board received letters from the public, industry associations and city officials supporting ICC's request to the Board to adopt the most recent editions of the two codes. Those who sent letters of support include John R. Brown, MCP, Director at Large, Building Officials Association of Texas; John R. Brown, MCP, Building Official, City of Rosenberg; John R. Brown, MCP, President, Brazos Valley Chapter, ICC; Harry L. Savio, CAE, Executive Vice President, Home Builders Association of Greater Austin; Lonnie Erwin, Chief Plumbing and Mechanical Inspector, City of Dallas; Bennie M. Reed, Chief Building Official, City of McKinney; Gary Adams, Assistant Building Official, City of McKinney; Paul Peterman, Chief Plumbing Inspector, City of McKinney; David Lancaster, Executive Vice President, Texas Society of Architects; Michael R. Henry, Building & Development Director, City of Rockport; Steve O'Neal, Chief Building Official, City of Lubbock; Chris Haver, CBO, City of College Station; Danny Sikorski, Chief Building Official, City of Bryan; Gil Durant, Inspections Department, City of Seguin; G. Greg Jones, Chief Building Official, City of Coppell; Charlie Hall, Westway Sales, Inc.; Ned Munoz, Director of Regulatory Affairs, Texas Association of Builders; Barbara Lochridge, Executive Director, North Texas Chapter of Plumbing-Heating-Cooling Contractors Association; Selso Mata, Vice President, North Texas Chapter of the ICC; Danny McNabb, Building Inspection Division Manager, City of Austin; Kathryn A. "Toy" Wood, Executive Vice President and CEO, Greater Houston Builders Association; Gary Miles, Assistant Building Official, City of Plano; David Sartor, Building Official, City of Abilene; Scott A. McDonald, Building Official, City of Amarillo; Larry F. Nichols, Deputy Director, Building Permits and Inspection, City of El Paso and Jim Powell, President, Panhandle Inspectors Association of Texas.

The Board has received no public comments, thus far, in opposition to the proposal.

Section 1301.255 of the Plumbing License Law specifically names the UPC and the IPC as the two codes to be adopted by the Board. The UPC contains all of the requirements for installation of plumbing within the one code. However, the IPC requires fuel gas plumbing to be installed according to the requirements of the International Fuel Gas Code and residential plumbing to be installed in accordance with the International Residential Code. Additionally, Chapter 214, Subchapter G of the Local Government Code, requires municipalities to adopt the International Residential Code. For those reasons, the language in the proposed amendment includes the International Fuel Gas Code and the International Residential Codes, the two codes referenced within the International Plumbing Code. Including the names of the two codes referenced within the IPC will provide clarity to the public, plumbing industry, municipalities, and owners of public water systems.

The rule amendments will require individuals who are preparing for examinations administered by the Board to prepare for the examinations using the 2006 Uniform Plumbing Code or the 2006 International Plumbing Code. Applicants for examination who choose the 2006 International Plumbing Code to prepare would also study the 2006 International Fuel Gas Code and the 2006 International Residential Code, as applicable. Applicants who choose the 2006 Uniform Plumbing Code would also study the 2006 International Residential Code, as applicable.

The rule amendments will also require licensed plumbers who install plumbing in geographical areas where no local jurisdiction has adopted a plumbing code, to install plumbing in accordance with the 2006 Uniform Plumbing Code or the 2006 International Plumbing Code. Licensed plumbers who install plumbing in these areas according to the 2006 International Plumbing Code would also need to meet the requirements of the 2006 International Fuel Gas Code and the 2006 International Residential Code, as applicable.

Plumbing installed within local jurisdictions which have adopted a plumbing code will continue to be installed in accordance with the code adopted by the local jurisdiction.

The rule amendments also update an obsolete reference in §367.1(b), which refers to disciplinary procedures which were previously found in Chapter 365. The amendments correctly state that the procedures are now found in Chapter 367 of the rules.

The amendments also update language in §367.1(h), which establish no new requirements, but reflect changes made to §1301.255(e) of the Plumbing License Law by the 80th Legislature.

Economic Impact Statement, Regulatory Flexibility Analysis and Public Benefit. Although §1301.255(b) of the Plumbing License Law authorizes the Board to adopt later editions of the two codes, the Board does not interpret this Section as requiring municipalities or owners of public water systems to also adopt later editions of the UPC or IPC. Section 1301.255(d) allows a municipality or owner of a public water system, in adopting a code, to amend any provisions of the code to conform to local concerns that do not substantially vary from Board rules or other rules of the state. A municipality or owner of a public water system may choose whether or not to adopt the latest edition of the UPC or IPC. The rule amendments will have no negative economic impact on municipalities or owners of public water systems.

The rule amendments will have no significant negative economic impact on applicants preparing for an examination administered by the Board, because applicants who choose to purchase codes to prepare for an examination will purchase a 2006 edition of the codes instead of purchasing an earlier edition.

The rule amendment will have no significant negative economic impact on licensed plumbers, including small businesses which employ licensed plumbers, who install plumbing in geographical areas where no local jurisdiction has adopted a plumbing code, because the amendments will allow incomplete plumbing installations which commenced under the requirements of an earlier edition of the plumbing codes and prior to the Board's adoption of the 2006 editions of the plumbing codes, to continue to completion under the requirements of the earlier edition.

The public benefits of adopting the proposed amendments will be that, following the effective date of the amendments, licensed plumbers will have passed an examination based on the most current editions of the plumbing codes. Additionally, plumbing installed by licensed plumbers in geographical areas where no local jurisdiction has adopted a plumbing code, will be installed to meet the requirements of the most current editions of the plumbing codes. Plumbing installed in accordance with the latest editions of the plumbing codes will better protect the health and safety of the public.

Comments on the proposed rule changes, including the Economic Impact Statement, Regulatory Flexibility Analysis and Public Benefit, may be submitted within 30 days of publication of these proposed rule amendments in the *Texas Register*, to Robert L. Maxwell, Executive Director, Texas State Board of

Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

The amendments to §367.1 are proposed under and affect Title 8, Chapter 1301, Occupations Code, ("Plumbing License Law"), §1301.251, §1301.255, and the rule it amends. Section 1301.251 requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law. Section 1301.255 allows the Board to adopt later editions of plumbing codes and requires plumbing installed by licensed plumbers in geographical areas where no local jurisdiction has adopted a plumbing code, to be installed in accordance with the codes adopted by the Board. The amendments to §367.1 are also proposed under Texas Government Code §2006.002, as amended by the 80th Legislature, HB 3430, which requires an agency to perform an Economic Impact Statement and Regulatory Flexibility Analysis if a proposed rule could have an adverse economic impact on small businesses.

No other statute, article or code is affected by this proposed amendment.

§367.1. General Provisions.

(a) Enforcement of all applicable laws including the Act, Board rules, and Board orders vests in the Board.

(b) Enforcement of the Act, local codes, and ordinances, and local standards of competency vests in local authorities. The Board may take disciplinary actions as specified in this Chapter [~~365 of this title, related to licensing and registrations,~~] in the event of any violation of any of these requirements.

(c) Each locally designated plumbing inspector shall enforce the Act and municipal ordinances and should file complaints with the Board and with local prosecutors.

(d) The Board shall employ individuals knowledgeable of plumbing practice and law as field representative to assist in the enforcement of the Act. A field representative may:

(1) Inspect plumbing work sites to assess compliance with the Law;

(2) Inquire into consumer complaints and reported violations of the Law;

(3) Assist municipal authorities in enforcing the Act; and

(4) Issue citations for violations of the Act.

(e) To protect the health and safety of the citizens of this state, the Board adopts the following plumbing codes[~~, as those codes existed on May 31, 2001~~]:

(1) the 2006 Uniform Plumbing Code, as published by the International Association of Plumbing and Mechanical Officials; and

(2) the 2006 International Plumbing Code, as published by the International Code Council and the codes incorporated by reference within the 2006 International Plumbing Code, including:

(A) the 2006 International Fuel Gas Code and;

(B) the 2006 International Residential Code.

(f) The Board may by rule adopt later editions of the plumbing codes listed under Subsection (e) of this section.

(g) Plumbing installed in an area not otherwise subject to regulation under the Act by an individual licensed under the Act must be installed in accordance with a plumbing code adopted by the Board under Subsection (e) or (f) of this section. Incomplete plumbing installations which commenced under the requirements of an earlier edition of the plumbing codes and prior to the Board's adoption of the 2006 editions of the plumbing codes, may continue to completion under the requirements of the earlier edition.

(h) In adopting plumbing codes and standards for the proper design, installation, and maintenance of a plumbing system under this section, a municipality or an owner of a public water system may amend any provisions of the codes and standards to conform to local concerns that do not substantially vary with rules or laws of this state.

(i) Plumbing installed in compliance with a code adopted under Subsection (e), (f), or (h) of this section must be inspected by a plumbing inspector. To perform this inspection, the political subdivision may contract with any plumbing inspector or qualified plumbing inspection business, as determined by the political subdivision, that is paid directly by the political subdivision. The plumbing inspector must be licensed as required by §§1301.255(e), 1301.351(b) and 1301.551 of the Plumbing License Law.

(j) The potable water supply piping for every plumbing fixture, including water closet plumbing fixtures and other equipment that use water shall be installed to prevent the back flow of non-potable substances into the potable water system according to the provisions of an adopted plumbing code. Water closet fill valves (ball cocks) shall be of the anti-siphon, integral vacuum breaker type with the critical level (the air inlet portion of the vacuum breaker) installed at least one inch (1") above the flood level rim of the fixture (the inlet of the water closet overflow tube).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 17, 2008.

TRD-200802016
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 936-5224

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TITLE 28. INSURANCE

PART 1. TEXAS DEPARTMENT OF INSURANCE

CHAPTER 3. LIFE, ACCIDENT AND HEALTH INSURANCE AND ANNUITIES

SUBCHAPTER T. MINIMUM STANDARDS FOR MEDICARE SUPPLEMENT POLICIES

28 TAC §3.3313

The Texas Department of Insurance proposes an amendment to §3.3313, concerning filing requirements for Medicare supplement insurance advertisements requiring Departmental review. The proposed amendment to §3.3313(1) clarifies that an issuer providing Medicare supplement insurance benefits need not submit to the Department for review institutional advertisements that merely reference Medicare supplement insurance as a line of coverage offered by the issuer. The Department has determined that institutional advertisements that merely reference Medicare supplement insurance as a line of coverage are rou-

tinely accepted by the Department without objections and are not currently a source of false, misleading, or deceptive marketing practices. Therefore, the proposed amendment is necessary to more effectively utilize Departmental resources without compromising consumer protection. Additionally, the proposal will provide more efficient and cost-effective advertising filing requirements for Medicare supplement insurance issuers.

FISCAL NOTE. Audrey Selden, Senior Associate Commissioner, Consumer Protection Division, has determined that, for each year of the first five years the proposed amendment is in effect, there will be no fiscal impact on state or local government as a result of enforcing or administering the proposal. Ms. Selden has also determined that there will be no measurable effect on local employment or the local economy as a result of the proposal.

PUBLIC BENEFIT/COST NOTE. Ms. Selden also has determined that, for each year of the first five years the proposal is in effect, the amendment will decrease the Department's costs of regulating the marketing practices of issuers providing Medicare supplement insurance by reducing the number of institutional advertisements that need to be reviewed, which will enable the Department to redirect its resources to advertising practices that are a more frequent source of false, misleading, or deceptive marketing practices. In addition, removing the submission requirement for advertisements that merely reference Medicare supplement insurance as a line of coverage will decrease the number of advertisement submissions for issuers providing Medicare supplement insurance benefits. The proposed amendment does not impose additional requirements on any individual or entity, and therefore, there are no costs required to comply with the proposal.

ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS FOR SMALL AND MICRO BUSINESSES. As required by the Government Code §2006.002(c), the Department has determined that the proposed amendment will not have an adverse economic effect on small or micro businesses. The proposed amendment does not impose additional requirements on any individual or entity, and therefore, there are no costs required to comply with the proposal. The Department anticipates a decrease in regulatory costs for Medicare supplement insurance issuers, including any small or micro business issuers. In accordance with the Government Code §2006.002(c), the Department has therefore determined that a regulatory flexibility analysis is not required because the proposal will not have an adverse impact on small or micro businesses.

TAKINGS IMPACT ASSESSMENT. The Department has determined that no private real property interests are affected by this proposal and that this proposal does not restrict or limit an owner's right to property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking or require a takings impact assessment under the Government Code §2007.043.

REQUEST FOR COMMENTS. To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on June 2, 2008, to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. An additional copy of the comments must be submitted simultaneously to Jack Evins, Director, Advertising Unit, Consumer Protection Division, Mail Code 111-2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104. Any request for a public hearing should be submitted separately to the Office of the Chief Clerk before the close of the public comment period. If a hearing is held, written and oral comments presented at the hearing will be considered.

STATUTORY AUTHORITY. The amendment is proposed pursuant to Insurance Code §§1652.001, 1652.005, 36.003, and 36.001. Section 1652.001 provides that an approved regulatory program for Medicare supplement benefit plans means a state regulatory program that complies with the requirements of 42 U.S.C. 1395ss. Section 1652.005 authorizes the Commissioner of Insurance to adopt reasonable rules necessary and proper to implement Chapter 1652, including rules adopted in accordance with federal law relating to the regulation of Medicare supplement benefit plan coverage necessary for the state to obtain or retain federal certification as a state with an approved regulatory program. Subsection (b)(3) of 42 U.S.C. 1395ss requires review and approval of Medicare supplement advertising material to the extent authorized by state law. Section 36.003 provides that the Commissioner may not adopt rules restricting advertising or competitive bidding by a person regulated by the Department except to prohibit false, misleading, or deceptive practices. Section 36.001 authorizes the Commissioner of Insurance to adopt any rules necessary and appropriate to implement the powers and duties of the Texas Department of Insurance under the Insurance Code and other laws of this state.

CROSS REFERENCE TO STATUTES. The following statute is affected by this Proposal: Insurance Code Chapter 1652.

§3.3313. Filing Requirements for Advertising.

A Medicare supplement policy shall not be deemed to meet the standards and requirements set forth in this subchapter unless the filing company has complied with the requirements of the following paragraphs.

(1) Every issuer providing Medicare supplement insurance or benefits in this state shall provide to the department for review a copy of any Medicare supplement advertisement, as defined in §21.102 of this title (relating to Scope), other than an institutional advertisement, as defined in §21.102(6) that only references "Medicare supplement" as a line of coverage offered, but which does not otherwise describe Medicare supplement insurance or benefits [~~used to promote a policy which is approved under the provisions of this subchapter~~]. The copy of the advertisement shall be submitted to the department no later than 60 days prior to its first use. At the expiration of the 60-day period provided by this paragraph, any advertisement filed with the department shall be deemed acceptable, unless before the end of that 60-day period the department has notified the entity of its nonacceptance.

(2) All advertisements shall comply with all applicable federal and state laws and shall be submitted in accordance with §21.120 of this title (relating to Filing for Review). This section does not require prior departmental approval of the advertisement. Nothing in this section relieves any person from otherwise complying with all applicable laws or from any sanction imposed by law.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 14, 2008.

TRD-200801961

Gene C. Jarmon
General Counsel and Chief Clerk
Texas Department of Insurance
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 463-6327

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 290. PUBLIC DRINKING WATER

SUBCHAPTER D. RULES AND REGULATIONS FOR PUBLIC WATER SYSTEMS

30 TAC §§290.44, 290.46, 290.47

The Texas Commission on Environmental Quality (TCEQ or commission) proposes amendments to §§290.44, 290.46, and 290.47.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The primary purposes of the proposed amendments are to reflect changes to the Texas Health and Safety Code (THSC), §341.042 and §341.0357 made during the 80th Legislature, 2007, in §11 of House Bill (HB) 4, HB 1391, and §2.28 of Senate Bill (SB) 3.

HB 4, §11 and SB 3, §2.28 amend THSC, §341.042, Standards for Harvested Rainwater, by requiring the commission to establish rules for structures that are connected to a public water supply system and have a rainwater harvesting system for indoor use. The structure must have appropriate cross-connection safeguards, and the rainwater harvesting system may be used only for nonpotable indoor purposes. The commission's standards and rules adopted under THSC, Chapter 341, do not apply to a person who harvests rainwater for domestic use and whose property is not connected to a public drinking water supply system. However, these amendments do not change the commission's existing rules in §290.44(h) and §290.47(i) regarding backflow prevention.

HB1391 amends THSC, Chapter 341, Subchapter C, by adding §341.0357, Public Safety Standards. This bill requires that the regulatory authority for a public utility, as defined in TWC, §13.002(23), serving a residential area adopt public safety standards to maintain sufficient water pressure to fire hydrants in residential areas in a municipality with a population of one million or more. This section requires the commission to assess residential areas in a municipality with a population of one million or more to ensure that public safety standards are adopted by the regulatory authority for the area and that all public utilities serving the residential area are complying with the standards required by THSC, §341.0357. The appropriate standard will be determined by the governing body of the local regulatory authority on a site-specific basis dependent on the public water supply system design. The commission is proposing a minimum standard. The standard adopted by the local regulatory authority must meet or exceed this standard. The commission will require out-of-compliance regulated authorities and public utilities to comply within a reasonable time using its existing enforcement rules and policies.

SECTION BY SECTION DISCUSSION

The commission proposes to add §290.44(j), to implement THSC, §341.042, as amended by HB 4, §11 and SB 3, §2.28, 80th Legislature, 2007, to establish rules for structures that are connected to a public water supply system and have a rainwater harvesting system for indoor use, including that the rainwater harvesting system may be used only for nonpotable indoor purposes.

The commission proposes to add new §290.46(x) to meet the new public safety requirements from HB 1391. New subsection (x) includes the requirement that the regulatory authority for a public utility adopt standards for maintaining sufficient water pressure for service to fire hydrants adequate to protect public safety. In new subsection (x), the commission also proposes to add definitions for "regulatory authority," "public utility," and "residential area." These definitions are from TWC, §13.002(18) and (23) and THSC, §341.0357, respectively.

In accordance with HB 1391, subsection (x) only applies to municipalities with a population of 1,000,000 or more. The public safety standards only apply to "public utilities" as defined by TWC, §13.002 in residential areas inside the corporate limits of the municipality. The standards are designed to provide adequate flow to fire hydrants. The commission's proposed rule does not require a municipality to require that public utilities have fire hydrants in residential areas. The proposed rules would require public utilities that do have fire hydrants to maintain sufficient water pressure adequate to protect public safety.

The commission's proposed rule sets a minimum standard for service to fire hydrants so that the flow is at least 250 gallons per minute (gpm), with a minimum residual pressure of 20 pounds per square inch (psi), for a minimum of two hours. The commission intends to enforce this standard on public utilities to which it applies should the applicable local regulatory authority fail to adopt standards. The commission will also use that standard as the basis for determining whether local standards are inadequate under THSC, §341.0357(d).

The standard of 250 gpm, with a minimum residual pressure of 20 psi, for a minimum of two hours comes from legislation, TCEQ rules, and insurance standards. House Bill 1717, 80th Legislature, 2007, defines a fire hydrant as non-functioning if it pumps less than 250 gpm. Existing §290.46(r) requires a public water system to provide a minimum pressure of 20 psi during emergencies "such as firefighting." The Insurance Services Office (ISO), which rates municipality's fire systems for insurance purposes, for a public protection classification of eight or better, has a minimum standard of 250 gpm, with a minimum residual pressure of 20 psi, for a period of two hours. The ISO standard is also the source for the requirement that this flow be in addition to the community's daily rate of consumption for purposes other than fire protection.

The commission proposes to amend the figure in §290.47(i) in response to THSC, §341.042, as amended by HB 4, §11 and SB 3, §2.28, 80th Legislature, to show that any rainwater harvesting system connected to a public water system is a connection that constitutes a potential health hazard and requires a reduced-pressure principle backflow assembly or an air gap. This requirement already applies to rainwater harvesting systems under the commission's current rules. The amendment to §290.47(i) is being proposed to clarify that rainwater harvesting

systems other than those for nonpotable indoor use also require a backflow prevention assembly or air gap.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency or other units of state or local governments as a result of administration or enforcement of the proposed rules. The proposed rules implement changes to the THSC required by legislation from the 80th Legislature, 2007. The agency expects to perform any support, compliance, and enforcement tasks utilizing current resources. The agency anticipates that local governments will also utilize existing resources to comply with the proposed rules.

The proposed rules would amend §§290.44, 290.46, and 290.47 to comply with the requirements of HB 1391, HB 4, §11, and SB 3, §2.28, 80th Legislature, 2007. HB 1391 affects public utilities in municipalities with populations of one million or more residents by requiring the adoption of public safety standards regarding sufficient water pressure for service to fire hydrants in residential areas. The agency is required to assess whether a municipality acting as a regulatory authority has adopted an adequate standard and whether all public utilities serving residential areas within these municipalities comply with the standard. Under the proposed rules, the agency is proposing a minimum standard. Local governments may choose to establish a more stringent standard, and if this is the case, a public utility would be required to meet the more stringent local standard. The standard, as seen in the proposed rules, states that the minimum flow supplied to a fire hydrant by a public utility must be at least 250 gpm, with a minimum residual pressure of 20 psi, for a minimum of two hours. The proposed rules regarding this minimum standard are not expected to have a fiscal implication for local governments. Staff anticipates that a local government will choose to utilize existing resources to perform any regulatory duties associated with the proposed rules. Any increase in regulatory duties for a local government is expected to be small. Any fiscal implications would depend on the local government and how it chooses to implement its own standard. The proposed rules also implement the requirements of HB 4, §11, and SB 3, §2.28, to establish by rule health and safety standards for the indoor use of harvested rainwater when a structure is connected to a public water system and to specify that the utilization of rainwater, for structures connected to a public water supply system, must be restricted to nonpotable indoor uses. The agency is required to specifically state in its rules the requirements for the use of cross-connection safeguards by these structures. The proposed rules also clarify that any structure with a rainwater harvesting system that is connected to a public water supply system must have a backflow prevention device, as is already required under current agency rules.

The proposed rules are not expected to have a significant fiscal impact on local governments that may have to comply with these requirements. Local governments may be required to inspect facilities or enforce standards regarding harvested rainwater and document compliance in a more specific way. However, staff expects that many local governments are already practicing many of the requirements of the proposed rules because of acknowledged best practice methods or the use of techniques needed to comply with current health and safety standards for public drinking water. Furthermore, the agency expects that local governments will be able to comply with the proposed rules with existing staff.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be compliance with state law, possible reduction of demand for water, possible reductions in the loads for wastewater treatment, and adequate water supplied to fire hydrants by public utilities in residential areas within municipalities with populations of one million or more residents.

Businesses and individuals responsible for complying with harvested rainwater protections in the proposed rules are not expected to be fiscally impacted since current agency rules already require that cross-connection safeguards must be used to protect the drinking water of public water supply systems from rainwater harvesting systems.

There may be fiscal implications for public utilities that cannot already comply with at least the proposed minimum public safety standard regarding the provision of sufficient water pressure for service to fire hydrants. These utilities are investor owned, and staff is aware that there may be as many as eight micro-businesses that may be affected by the proposed rules. The fiscal implications for these micro-businesses are more fully discussed in the SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT section of this fiscal note. A large business that cannot meet at least the proposed minimum standard would experience the same fiscal impacts as a small business or micro-business.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for small business or micro-businesses as a result of the proposed minimum public safety standard regarding the provision of sufficient water pressure for service to fire hydrants in the areas affected by the proposed rules. Staff estimates that there are eight micro-businesses that serve as public utilities in the City of Houston. The fiscal impact on these eight micro-businesses will depend on what each investor owned utility is required to do to comply with the proposed minimum standard for fire hydrants in the residential areas they serve. The standard requires a flow of 250 gpm, with a minimum residual pressure of 20 psi, for a minimum of two hours. The amount of water line that may need to be upgraded and the capacity of a storage tank needed to comply with the standard are expected to vary depending on the circumstances of each public utility. Costs are estimated to be $18.20 per linear foot of six-inch water line and $1.50 per 1,000 gallons for a storage tank. There could also be engineering costs and financing costs associated with this type of project. If a public utility has to upgrade one mile of line (5,280 feet) and add a 50,000-gallon storage tank, total costs, excluding engineering and financing costs, could be as much as $171,000. These costs could be higher if the City of Houston adopts a standard that exceeds the standard found in the proposed rules. No adverse fiscal implications are anticipated for small or micro-businesses as a result of the proposed rainwater harvesting rule. Small or micro-businesses would be minimally affected by the proposed rainwater harvesting rule because current agency rules already require that cross-connection safeguards must be used to protect the drinking water of public water supply systems from rainwater harvesting systems.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are needed to comply with state law and are necessary to protect the health and safety of the state.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the proposed rulemaking in light of the regulatory analysis requirements of Texas Government Code, §2001.0225 and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in Texas Government Code, §2001.0225 or does not meet the applicability criteria. A "major environmental rule" is a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. The intent of the rulemaking is to incorporate changes made by HBs 4 and 1391 and SB 3 during the 80th Legislature, 2007, to THSC, §341.042 and §341.0357 (relating to Public Safety Standards). THSC, §341.0357, enacted by HB 1391, requires that the regulatory authority for a public utility serving a residential area adopt public safety standards to maintain sufficient water pressure to fire hydrants in residential areas in a municipality with a population of 1,000,000 or more. The specific intent of the proposed rulemaking related to this statute is to amend the commission's rules to incorporate recent legislative changes that reduce risks to human safety but that are not intended to protect the environment or reduce risks to human health from environmental exposure. Therefore, this proposed rulemaking does not meet the definition of a "major environmental rule."

THSC, §341.042, amended by HB 4 and SB 3, requires structures that are connected to a public water supply system and have a rainwater harvesting system for indoor use to have cross-connection safeguards, and the harvesting system may be used only for nonpotable indoor purposes. The intent of the rules proposed under and in response to this statute is to reduce risks to human health from environmental exposure. However, Texas Government Code, §2001.0225 only applies to a major environmental rule, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. This portion of the rulemaking does not meet any of these four applicability criteria because it: 1) does not involve any standard set by federal law; 2) does not exceed the requirements of THSC, §341.042 or any other state law; 3) does not exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; and 4) is not proposed solely under the general powers of the agency, but rather specifically under THSC, §341.042, which requires the commission to adopt rules to implement the statute, and THSC, §341.0315, which requires the commission to ensure that public drinking water supply systems supply safe drinking water. Therefore, these proposed rules do not fall under any of the applicability criteria in Texas Government Code, §2001.0225.

The commission invites public comment regarding this draft regulatory impact analysis determination. Written comments on the draft regulatory impact analysis determination may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated these proposed rules and performed an analysis of whether they constitute a taking under Texas Government Code, Chapter 2007. The specific purpose of these rules is to reflect changes to THSC, §341.042 and §341.0357 made during the 80th Legislature, 2007. The proposed rules will substantially advance this stated purpose by clarifying current rules and incorporating the requirements found in these statutes into the commission's rules.

The commission's analysis indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is reasonably taken to fulfill an obligation mandated by state law, which is exempt under Texas Government Code, §2007.003(b)(4). The commission is the regulatory agency for statutes found in THSC, Subchapter C, which contains §341.042 and §341.0357. The commission's analysis also indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. The proposed rules are designed to protect public drinking water systems from contamination and ensure that certain fire hydrants receive proper water pressure without imposing unnecessary burdens. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether they constitute a taking under Texas Government Code, Chapter 2007. Promulgation and enforcement of these proposed rules would be neither a statutory nor a constitutional taking of private real property. Specifically, the subject proposed regulations do not affect a landowner's rights in private real property because this rulemaking does not burden nor restrict or limit the owner's right to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the regulations. In other words, these rules require compliance with state statutes to protect public drinking water from contamination and provide sufficient water pressure for fire protection without burdening or restricting or limiting the owner's right to property and reducing its value by 25% or more. Therefore, the proposed rules do not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rules and found that they are neither identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(b)(2) or (4), nor will they affect any action/authorization identified in Coastal Coordination Act Implementation Rules, 31 TAC §505.11(a)(6). Therefore, the

proposed rules are not subject to the Texas Coastal Management Program.

The commission invites public comment regarding the consistency of this rulemaking. Written comments on the consistency of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

The commission will hold a public hearing on this proposal in Austin on May 29, 2008, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing is structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. Open discussion will not be permitted during the hearing; however, commission staff members will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services at (512) 239-0177. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Written comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-046-290-PR. The comment period closes June 2, 2008. Copies of the proposed rulemaking can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Cindy Haynie, Public Drinking Water Section at (512) 239-3465.

STATUTORY AUTHORITY

These amendments are proposed under Texas Water Code (TWC), §5.102, which establishes the commission's general authority necessary to carry out its jurisdiction, §5.103, which establishes the commission's general authority to adopt rules, §5.105, which establishes the commission's authority to set policy by rule; Texas Health and Safety Code (THSC), §341.0315, which requires the commission to ensure that public drinking water supply systems supply safe drinking water, §341.042, which requires the commission to enforce the requirements contained therein, and §341.0357, which requires the commission to enforce the requirements contained therein.

The proposed amendments implement THSC, §§341.0315, 341.042, and 341.0357.

§290.44. Water Distribution.

(a) - (i) (No change.)

(j) If a structure is connected to a public water supply system and has a rainwater harvesting system for indoor use, the structure must have appropriate cross-connection safeguards in accordance with subsection (h)(1) of this section and the rainwater harvesting system may be used only for nonpotable indoor purposes.

§290.46. Minimum Acceptable Operating Practices for Public Drinking Water Systems.

(a) - (w) (No change.)

(x) Public safety standards. This subsection only applies to a municipality with a population of 1,000,000 or more, with a public utility within its corporate limits.

(1) In this subsection:

(A) "Regulatory authority" means, in accordance with the context in which it is found, either the commission or the governing body of a municipality.

(B) "Public utility" means any person, corporation, cooperative corporation, affected county, or any combination of these persons or entities, other than a municipal corporation, water supply or sewer service corporation, or a political subdivision of the state, except an affected county, or their lessees, trustees, and receivers, owning or operating for compensation in this state equipment or facilities for the transmission, storage, distribution, sale, or provision of potable water to the public or for the resale of potable water to the public for any use or for the collection, transportation, treatment, or disposal of sewage or other operation of a sewage disposal service for the public, other than equipment or facilities owned and operated for either purpose by a municipality or other political subdivision of this state or a water supply or sewer service corporation, but does not include any person or corporation not otherwise a public utility that furnishes the services or commodity only to itself or its employees or tenants as an incident of that employee service or tenancy when that service or commodity is not resold to or used by others.

(C) "Residential area" means:

(i) an area designated as a residential zoning district by a governing ordinance or code or an area in which the principal land use is for private residences;

(ii) a subdivision for which a plat is recorded in the real property records of the county and that contains or is bounded by public streets or parts of public streets that are abutted by residential property occupying at least 75 percent of the front footage along the block face; or

(iii) a subdivision a majority of the lots of which are subject to deed restrictions limiting the lots to residential use.

(2) A public utility shall have the ability to deliver water to any fire hydrant connected to the public utility's water system located in a residential area so that the flow at the fire hydrant is at least 250 gpm, with a minimum of 20 psi residual pressure, for a minimum period of two hours. That flow is in addition to the public utility's maximum daily rate of consumption for purposes other than firefighting.

(3) When the regulatory authority is a municipality, it shall by ordinance adopt standards for maintaining sufficient water pressure for service to fire hydrants adequate to protect public safety in residential areas in the municipality. The standards specified in paragraph (2) of this subsection are the minimum acceptable standards.

(4) When the regulatory authority is a municipality, it shall adopt the standards required by this subsection within one year of the date this subsection first applies to the municipality.

(5) A public utility shall comply with the standards established by a municipality, within one year of the date the standards first apply to the public utility. If a municipality has failed to comply with the deadline required by paragraph (4) of this subsection, then a public utility shall comply with the standards specified in paragraph (2) of this subsection within two years of the effective date of this subsection or within one year of the date this subsection first applies to the public utility, whichever occurs later.

§290.47. Appendices.

(a) - (h) (No change.)

(i) Appendix I. Assessment of Hazard and Selection of Assemblies.

Figure: 30 TAC §290.47(i)

[~~Figure: 30 TAC §290.47(i)~~]

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802020

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Earliest possible date of adoption: June 1, 2008

For further information, please call: (512) 239-0177

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CHAPTER 334. UNDERGROUND AND ABOVEGROUND STORAGE TANKS

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) proposes amendments to §§334.2, 334.8, 334.21, 334.42, 334.45, 334.47, 334.49, 334.50, 334.54, 334.71, 334.84, 334.128, 334.301, 334.302 and 334.303.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE PROPOSED RULES

The purpose of the proposed amendments is to incorporate into agency rules, changes to statute which are effective September 1, 2007, based on language in House Bill (HB) 3554 and HB 1956, 80th Legislature, 2007, to incorporate certain underground storage tank (UST) provisions of the federal Energy Policy Act of 2005, and to update certain technical requirements pertaining to underground storage tanks. Changes include such items as the requirement of proof of financial assurance to be included with annual tank self-certifications; the cessation of annual facility fees; secondary containment for underground storage tank systems in accordance with EPA and Federal Energy Act requirements; and extension of the PST Reimbursement Program for four years.

The commission specifically requests comments on the issue (not addressed in the proposed rules) of whether Leaking Petroleum Storage Tank (LPST) sites should be removed from the requirements of 30 TAC Chapter 350, Texas Risk Reduction Program.

SECTION BY SECTION DISCUSSION

Throughout this rulemaking package, administrative changes have been made as necessary in accordance with Texas Register requirements.

Subchapter A - General Information

To expand the rule to incorporate reference to renewable fuels, proposed amendment to §334.2 would change the definition of "Motor fuel" and the definition of "Petroleum Product" to incorporate alcohol blended fuels and biodiesel blended with Number 1 and Number 2 diesel. To comply with statutory changes; proposed §334.8(c)(1)(A)(v) is amended to specify that only temporarily out of service USTs which are empty are exempt from self-certification; proposed §334.8(c)(3)(D)(iii) is amended to specify that copies of financial assurance documents are required to be submitted as part of self-certification; and proposed §334.8(c)(4)(A)(viii) is amended to specify that proof of current financial assurance must be submitted annually.

Subchapter B - Underground Storage Tank Fees

To comply with statutory changes, proposed §334.21 is amended to add language addressing the cessation of annual UST facility fees, effective September 1, 2007, until such time as reinstated by the commission at amounts set by the commission, but specifies that prior tank fees are still due. Section 334.21(b) is amended to change the reference from "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality."

Subchapter C - Technical Standards

To incorporate requirements of the federal Energy Act of 2005; proposed §334.42(h) is added to specify the requirement for secondary containment (in accordance with the requirements of proposed §334.45(d)(1)(E)) for any new tank, line or dispenser installed on or after the effective date of this rule. In response to problems noted in routine inspections of UST systems, proposed §334.42(i) is added to specify that any sumps (including dispenser sumps) or manways, installed prior to the effective date of the subsection, which are utilized as an integral part of a UST release detection system and any overspill containers or catchment basins installed at any time, which are associated with a UST system must be maintained liquid tight and kept free of water and/or debris. Proposed §334.45(b)(4)(A) is amended to add the term "or any other water" to the list of media which metallic tank fittings must be isolated from, to expand the list and provide clarification and consistency in rule language. Proposed §334.45(d)(1)(E) is added to specify detailed requirements for secondary containment (referenced at proposed new §334.42(h)) for new tanks or lines installed as part of a UST system on or after the effective date of the rule, and for dispenser sumps for new dispensers or for existing dispensers served by new UST piping. Proposed §334.47(b)(1)(A)(ii) is amended to add the term "or any other water" to the list of media which clad or jacketed metal tanks are isolated from, to expand the list and provide clarification and consistency in rule language. Proposed §334.47(b)(1)(C) is amended to add the term "or any other water" to the list of media which clad metal components are not isolated from, to expand the list and provide clarification and consistency in rule language. Proposed §334.49(b)(2) and (3) are amended to add the term "or any other water" to the list of corrosive elements which a UST system component may be isolated from to expand the list and provide clarification and consistency in rule language and by adding the word "from" prior to the term "other metallic components" to clarify the intent of the language. Proposed §334.49(b)(3)(B) is amended to add the term "or any other water" to the list of media which must be kept out of secondary containment interstices to expand the list and provide clarification and consistency in rule language. Proposed §334.49(c)(1)(B)(i) is amended to add the term "or any other water" to the list media an exterior surfaces might be exposed to, to expand the list and provide clarification and consistency in rule language. Proposed §334.49(d)(1)(A) and (C) is amended to add the term "or any other water" to the list of media which metal components are isolated from, to expand the list and provide clarification and consistency in rule language and by adding the word "from" prior to the term "other metallic components" to clarify the intent of the language. Proposed §334.50(d)(7)(C) is

amended to add the term "and any other water" to "groundwater" to expand and clarify the intent of that subparagraph. Proposed §334.54(e)(5) is added to address financial assurance requirements for tanks temporarily removed from service to comply with statutory changes.

Subchapter D - Release Reporting and Corrective Action

Proposed §334.71(b)(6) is amended to extend the deadline for submitting a site closure request from September 1, 2007 to September 1, 2011 to comply with statutory changes. Proposed §334.84(a)(4) is amended to extend the deadline for eligible owners/operators who have been granted an extension for corrective action reimbursement by the agency to apply to the agency to have an eligible corrective action site placed in the commission's State Lead Program from July 1, 2007 to July 1, 2011 to comply with statutory changes.

Subchapter F - Aboveground Storage Tanks

Section 334.128(a)(4) is amended to change the reference from "Texas Natural Resource Conservation Commission" to "Texas Commission on Environmental Quality." To comply with statutory changes, proposed §334.128(e) is amended to add language addressing the cessation of annual aboveground storage tank facility fees, effective September 1, 2007, until such time as reinstated by the commission at amounts set by the commission, but specifies that prior tank fees are still due.

Subchapter H - Reimbursement Program

The following amendments are proposed to comply with statutory changes. Proposed §334.301(c) is amended by adding language in accordance with statute which extends the deadline for the performance of corrective action from before August 31, 2007 to before August 31, 2011, for eligible owners/operators who have been granted an extension for corrective action reimbursement by the agency; by amending in accordance with statute the deadline for filing a claim for reimbursement from March 1, 2008, to March 1, 2012; and by amending in accordance with statute the final deadline for payment of reimbursements from September 1, 2008, to September 1, 2012. Proposed §334.302(c)(5) is amended by adding language in accordance with statute which extends the deadline for the performance of corrective action from before August 31, 2007 to before August 31, 2011, for eligible owners/operators who have been granted an extension for corrective action reimbursement by the agency. Proposed §334.302(c)(6) is amended by changing in accordance with statute the deadline for filing a claim for corrective action reimbursement with the agency from March 1, 2008, to March 1, 2012. Proposed §334.302(c)(7) is amended by changing the final deadline for payment of any expenses related to corrective action reimbursements from September 1, 2008, to September 1, 2012. Proposed §334.303(a) is amended by changing the deadline for filing an application (claim) for reimbursement from March 1, 2008, to March 1, 2012.

FISCAL NOTE: COSTS TO STATE AND LOCAL GOVERNMENT

Nina Chamness, Analyst, Strategic Planning and Assessment, has determined that, for the first five-year period the proposed rules are in effect, no significant fiscal implications are anticipated for the agency as a result of administration or enforcement of the proposed rules since the agency expects to utilize current resources to modify existing databases to track mandated self certifications regarding compliance with state and federal regulations. Although the proposed rules reduce the amount of fee revenue collected, the agency will utilize fund balances in Account 549, Waste Management Account and Account 655, Petroleum Storage Tank Remediation (PSTR) Account to perform compliance duties. If other state agencies and local governments decide to install USTs after the effective date of this rule, they may experience cost increases to install tanks compliant with the proposed rules, but those costs could be offset by decreased cleanup costs.

The proposed rules are needed to implement provisions of HB 3554 and HB 1956, 80th Legislature, and incorporate federal requirements regarding USTs. HB 3554 extended the PST Reimbursement Program and associated remediation and reimbursement deadlines by four years; reduced the amount of the fee that is imposed on the bulk delivery of petroleum products; eliminated the tank registration fee previously collected by the agency; and allowed the agency to utilize fund balances in Account 549, Waste Management Account and Account 655, PSTR Account to perform compliance duties. The proposed rules also incorporate the requirements of HB 1956 which requires proof of financial assurance to be included with UST self-certification. The proposed rules incorporate federal requirements regarding, secondary containment for UST systems, renewable fuels, and other technical PST requirements.

House Bill 3554 reduced the fee assessed on delivery of bulk petroleum products by two thirds; this fee funds the PSTR Account 655. The cessation of the collection of annual PST facility fees which fund Account 549, Waste Management Account will reduce agency revenue by an estimated $3.2 million per year for the next four years the proposed rules are in effect. During this same time frame, the agency should also experience steadily declining expenditures due to an expected decline in the number of reimbursement eligible PST sites in remediation. Also, the agency's authorization to utilize fund balances in Account 549, Waste Management Account and Account 655, PSTR Account to perform compliance duties allow the agency to administer the PST program with no significant fiscal impact expected as a result of the proposed rules.

Staff estimates that there may be as many as 558 PSTs at 266 facilities owned by other state agencies and as many as 2,219 PSTs at 984 facilities owned by local governments. If a state agency or local government decides to install a new facility or replace old tanks, it will be required to comply with technical requirements regarding secondary containment. These costs can vary widely depending on the UST Installer, the equipment manufacturer, the equipment installed, the location of facilities, the soil conditions at a facility, and the size of tanks installed. Staff estimates that although the specific cost of a new double wall tank is approximately 50% greater than a new single wall tank of the same size, the overall increase in cost to incorporate double wall tanks and lines at a large new UST facility under the proposed rules will likely be 2% or less of the total cost when the combined costs for land, improvements, dispensers, and paving are considered. At an existing UST site, note that facility owners or operators will not be required to do an upgrade until they are already doing equipment replacement (e.g., new tanks, new lines, dispenser sumps with sensors). The total cost of such a construction project (including digging up the pavement, etc.) with a secondary containment upgrade versus a similar construction project without a secondary containment upgrade would only be about 11% more. Any cost increases related to secondary containment are expected to reduce the cost and risk of any future PST remediation needed at these facilities.

PUBLIC BENEFITS AND COSTS

Nina Chamness also determined that for each year of the first five years the proposed rules are in effect, the public benefit anticipated from the changes seen in the proposed rules will be increased protection of the environment because of more protective equipment requirements and continued remediation at PST sites.

Staff estimates that there are over 17,000 UST facilities owned by businesses statewide. If a new UST facility is built or if a UST is replaced at an existing facility, businesses will be required to comply with the secondary containment provisions of the proposed rules. These costs can vary widely depending on the UST Installer, the equipment manufacturer, the equipment installed, the location of facilities, the soil conditions at a facility, and the size of tanks installed. Staff estimates that although the specific cost of a new double wall tank is approximately 50% greater than a new single wall tank of the same size, the overall increase in cost to incorporate double wall tanks and lines at a new retail UST facility under the proposed rules will likely be 2% or less of the total cost when the combined costs for land, improvements, dispensers, and paving are considered. At an existing UST site, note that a facility owner or operator will not be required to do an upgrade until they are already doing equipment replacement (e.g., new tanks, new lines, dispenser sumps with sensors). The total cost of such a construction project (including digging up the pavement, etc.) with a secondary containment upgrade versus a similar construction project without a secondary containment upgrade would only be about 11% more. Any cost increases related to secondary containment are expected to reduce the cost and risk of any future PST remediation needed at these facilities.

SMALL BUSINESS AND MICRO-BUSINESS ASSESSMENT

Adverse fiscal implications are anticipated for small or micro-businesses that own or operate PST facilities. Small or micro-businesses can expect to see the same cost increases for secondary containment as those experienced by governmental entities and large businesses. However, these cost increases are expected to eliminate or reduce remediation costs at a future date.

SMALL BUSINESS REGULATORY FLEXIBILITY ANALYSIS

The commission has reviewed this proposed rulemaking and determined that a small business regulatory flexibility analysis is not required because the proposed rules are required to comply with state and federal law and to protect the environment and public health and safety.

LOCAL EMPLOYMENT IMPACT STATEMENT

The commission has reviewed this proposed rulemaking and determined that a local employment impact statement is not required because the proposed rules do not adversely affect a local economy in a material way for the first five years that the proposed rules are in effect.

DRAFT REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Although the specific intent of this rule is to implement statutory changes relating to continuation of the Petroleum Storage Tank Reimbursement Program, the second prong of the definition of a "major environmental rule" is not met: The proposed rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Further, it does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) states that this section applies only to a major environmental rule adopted by a state agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law. These proposed rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225 even if they did meet the definition of a major environmental rule. Specifically, the proposed rules are required by state law, are not proposed solely under the general powers of the agency, and do not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

Written comments on the draft regulatory impact analysis determination of this rulemaking may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the proposed rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these proposed rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; and that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The proposed rules are an "action taken in response to a real and substantial threat to public health and safety" in that contamination from releases from underground storage tanks pose a threat to both soils and groundwater with which the public may come into contact. The proposed rules are "designed to significantly advance the health and safety purpose" by extending the PST Reimbursement Program for four years, which helps ensure that funds are available for addressing contamination from releases from underground storage tanks. The proposed rules "do not impose a greater burden than is necessary to achieve the health and safety purpose" because they are narrowly tailored to the class of tank owners or operators and narrowly tailored to specific conditions or events, such as termination of financial assurance coverage.

Nevertheless, the commission further evaluated these proposed rules and performed an assessment of whether these proposed rules constitute a taking under Texas Government Code, Chapter 2007.

Promulgation and enforcement of the proposed rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the proposed rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the proposed rules. Additionally, there are benefits to society from the proposed rules, including the extension of the PST Reimbursement Program as a funding mechanism for cleanup of contamination from releases from tanks, stricter technical standards which tend to prevent releases which could damage private property, and financial assurance documentation requirements which tend to assure that cleanup of property is funded. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the proposed rulemaking and found the proposal is a rulemaking identified in the Coastal Coordination Act Implementation Rules (31 TAC §505.11(b)(2)) subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

The commission reviewed this rulemaking for consistency with the CMP goals and policies in accordance with the regulations of the Coastal Coordination Council and determined that the rulemaking protects the environment by ensuring that dollars continue to be available for cleanup of reimbursement eligible sites and by upgrading certain administrative and technical requirements of USTs that will serve to enhance the protection of coastal environments and will have no substantive effect on commission actions subject to the CMP and is, therefore, consistent with CMP goals and policies.

The commission is seeking public comment on the consistency of the proposed rulemaking with the CMP. Written comments may be submitted to the contact person at the address listed under the SUBMITTAL OF COMMENTS section of this preamble.

ANNOUNCEMENT OF HEARING

A public hearing on this proposal will be held in Austin on May 27, 2008, 10:00 a. m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Michael Parrish, Office of Legal Services, at (512) 239-2548. Requests should be made as far in advance as possible.

SUBMITTAL OF COMMENTS

Comments may be submitted to Michael Parrish, MC 205, Texas Register Team, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: *http://www5.tceq.state.tx.us/rules/ecomments/*. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Rule Project Number 2007-037-334-PR. Copies of the proposed rulemaking can be obtained from the commission's Web site at http://www.tceq.state.tx.us/nav/rules/propose_adopt.html. Comments must be received by June 2, 2008. For further information, please contact Anton E. Rozsypal, Jr., P.E., Remediation Division, at (512) 239-5755 or Cullen McMorrow, Litigation Division, at (512) 239-0607.

SUBCHAPTER A. GENERAL PROVISIONS

30 TAC §334.2, §334.8

STATUTORY AUTHORITY

These amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule. TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The proposed amendments implement TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The proposed amendments also implement certain underground storage tank provisions of the federal Energy Policy Act of 2005.

§334.2. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) - (58) (No change.)

(59) Motor fuel--A petroleum substance which is typically used for the operation of internal combustion engines (including stationary engines and engines used in motor vehicles, aircraft, and marine vessels), and which is one of the following types of fuels: motor gasoline, aviation gasoline, Number 1 diesel fuel, Number 2 diesel fuel, biodiesel blended with Number 1 or Number 2 diesel, [~~or~~] gasohol or other alcohol blended fuels.

(60) - (78) (No change.)

(79) Petroleum product--A petroleum substance obtained from distilling and processing crude oil that is liquid at standard conditions of temperature and pressure, and that is capable of being used as a fuel for the propulsion of a motor vehicle or aircraft, including, but not limited to, motor gasoline, gasohol, other alcohol blended fuels, aviation gasoline, kerosene, distillate fuel oil, [~~and~~] Number 1 and Number 2 diesel, and biodiesel blended with Number 1 or Number 2 diesel. The term does not include naphtha-type jet fuel, kerosene-type jet fuel, or a petroleum product destined for use in chemical manufacturing or feedstock of that manufacturing.

(80) - (123) (No change.)

§334.8. Certification for Underground Storage Tanks (USTs) and UST Systems.

(a) - (b) (No change.)

(c) UST compliance self-certification requirements.

(1) Applicability. Except as provided in this paragraph, the requirements of this subsection are applicable to the owners and operators of USTs regulated under this chapter.

(A) The requirements of this subsection are not applicable to the following USTs:

(i) - (iv) (No change.)

(v) USTs temporarily out-of-service under §334.54 of this title (relating to Temporary Removal from Service) which are empty by definition.

(B) (No change.)

(2) (No change.)

(3) Conditions and limitations.

(A) - (C) (No change.)

(D) The administrative requirements and technical standards that are the subject of the compliance self-certification shall include:

(i) - (ii) (No change.)

(iii) financial assurance, as described in Chapter 37, Subchapter I of this title (relating to Financial Assurance for Petroleum Underground Storage Tank Systems) (Copies of financial assurance documents are required to be submitted as part of self-certification, as specified in paragraph (4)(A)(viii) of this subsection); and

(iv) (No change.)

(4) UST registration and self-certification form.

(A) Requirements for completion of the form.

(i) - (vii) (No change.)

(viii) The owner or operator must submit annually, proof of current financial assurance, in accordance with §37.870(b) of this title (relating to Reporting, Registration, and Certification).

(B) - (C) (No change.)

(5) - (6) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

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Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 239-6091

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SUBCHAPTER B. UNDERGROUND STORAGE TANK FEES

30 TAC §334.21

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule. TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The proposed amendment implements TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The proposed amendment also implements certain UST tank provisions of the federal Energy Policy Act of 2005.

§334.21. Fee Assessment.

(a) Annual facility fees shall cease to be assessed, effective September 1, 2007, and shall not be assessed until such time as reinstated by the commission at an amount determined appropriate by the commission, however, prior owing tank fees are still due as further described. Except as provided in subsection (e) of this section, an annual facility fee of $50 is assessed for each underground storage tank (UST) subject to the registration provisions of §334.7 of this title (relating to Registration for Underground Storage Tanks (USTs) and UST Systems). The fees shall be billed to and paid by the owner of the tank.

(b) Payment of annual facility fees is due within 30 days of the date the agency sends a statement of the assessment to the tank owner. Annual facility fees must be paid by check, certified check, or money order made payable to the Texas Commission on Environmental Quality. [~~"Texas Natural Resource Conservation Commission."~~] Payments must be mailed to the address specified in the billing statement.

(c) - (e) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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For further information, please call: (512) 239-6091

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SUBCHAPTER C. TECHNICAL STANDARDS

30 TAC §§334.42, 334.45, 334.47, 334.49, 334.50, 334.54

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state

relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule. TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The proposed amendments implement TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The proposed amendments also implement certain UST provisions of the federal Energy Policy Act of 2005.

§334.42. General Standards.

(a) - (g) (No change.)

(h) Any new tank or line or dispenser installed as part of a UST system on or after the effective date of this subsection shall incorporate secondary containment meeting the applicable requirements of §334.45(d)(1)(E) of this title (relating to Technical Standards for New Underground Storage Tank Systems).

(i) Any sumps (including dispenser sumps) or manways installed prior to the effective date of this subsection, which are utilized as an integral part of a UST release detection system, and any overspill containers or catchment basins installed at any time, which are associated with a UST system must be maintained liquid tight and free of water and/or debris.

§334.45. Technical Standards for New Underground Storage Tank Systems.

(a) (No change.)

(b) Technical standards for new tanks.

(1) - (3) (No change.)

(4) Other new tank components.

(A) Fittings. All metallic tank fittings (e.g., bung hole plugs) shall be protected from corrosion and shall be either:

(i) isolated from the backfill material and groundwater or any other water;

(ii) - (iii) (No change.)

(B) - (C) (No change.)

(c) (No change.)

(d) Secondary containment for UST systems.

(1) Applicability.

(A) - (D) (No change.)

(E) Requirements applicable to new tanks, lines and or dispensers (including related sumps or manways) installed on or after the effective date of this subparagraph:

(i) Any new tank or line installed as part of a UST system on or after the effective date of this subparagraph, must be of double wall construction (or agency accepted alternative) meeting the applicable requirements of this subchapter.

(ii) Up to 10% of the total original length of an existing single wall line can be replaced with new single wall line in accordance with the applicable requirements of this subchapter without triggering the double wall requirement for that line. If more than 10% of the total original length of an existing single wall line is to be replaced, that line must be replaced in its entirety with one of double wall construction (or agency accepted alternative).

(iii) The interstice of the double wall (or agency accepted alternative) tank and/or line must be monitored in accordance with the requirements of §334.50(d)(7) of this title.

(iv) Any sumps or manways included in a UST system with a new double wall tank/s and/or line/s must be installed and maintained liquid tight, inspected for tightness annually and tested for tightness immediately after installation and at least once every three years thereafter.

(v) Each new dispenser or existing dispenser served by new UST system piping must employ a dispenser sump which is installed and maintained liquid tight, inspected for tightness annually and tested for tightness, immediately after installation and at least once every three years thereafter.

(vi) All sumps (including dispenser sumps) and/or manways must be equipped with a liquid sensing probe/s which will alert the UST system owner or operator if more than two inches of liquid collects in any sump or manway.

(vii) Liquids in sumps or manways must be removed and properly disposed of within 48 hours of alert or discovery.

(viii) The presence of 1/8 inch or more of free product in sumps or manways must be reported as a suspected release in accordance with §334.74(4) of this title (relating to Release Investigation and Confirmation Steps).

(ix) Inspections and testing must be performed by a qualified person who possesses the requisite experience, training, and competence to conduct the inspection or test properly, in accordance with applicable industry standards or practices.

(2) - (4) (No change.)

(e) - (f) (No change.)

§334.47. Technical Standards for Existing Underground Storage Tank Systems.

(a) (No change.)

(b) Minimum upgrading requirements for all existing UST systems.

(1) Tank integrity assessment and UST system cathodic protection. No later than December 22, 1998, all tanks in an existing UST system shall be assessed for structural integrity, and all underground metallic components of an existing UST system shall be equipped with a cathodic protection system, as provided in the following subparagraphs.

(A) Tank integrity assessment. The tank shall be assessed for structural integrity and for the presence of corrosion holes by one or more of the following methods.

(i) (No change.)

(ii) The tank may be tested by conducting at least two tank tightness tests meeting the requirements of §334.50(d)(1)(A) of this title. The first tightness test shall be conducted prior to installing the cathodic protection system, and the second test shall be conducted between three and six months after the cathodic protection system is placed into operation. For tanks constructed of non-corrodible mate-

rial, or metal tanks clad or jacketed with noncorrodible material which are electrically isolated from surrounding soil, backfill or groundwater or any other water, the tank may be tested by conducting at least one tightness test meeting the requirements of §334.50(d)(1)(A) of this title, within the 12 month period prior to December 22, 1998.

(iii) - (v) (No change.)

(B) (No change.)

(C) Field-installed cathodic protection system. After confirmation or restoration of the structural integrity of the tank, all underground metal components of the UST system, which are not isolated from the surrounding soil, backfill, and groundwater or any other water, and which either do or could convey, contain, or store regulated substances, shall be equipped with a field-installed cathodic protection system meeting the requirements of §334.49(c)(2) of this title (relating to Corrosion Protection).

(2) - (4) (No change.)

(c) - (e) (No change.)

§334.49. Corrosion Protection.

(a) (No change.)

(b) Allowable corrosion protection methods. All components of an UST system which are designed to convey, contain, or store regulated substances shall be protected from corrosion by one or more of the following methods.

(1) (No change.)

(2) The component may be electrically isolated from the corrosive elements of the surrounding soil, backfill, groundwater or any other water, and from other metallic components by installing the component in an open area (e.g., manway, sump, vault, pit, etc.) where periodic visual inspection of all parts of the component for the presence of corrosion or released substances is practicable.

(3) The component may be electrically isolated from the corrosive elements of the surrounding soil, backfill, groundwater or any other water, and from other metallic components by completely enclosing the component in a secondary containment device (e.g., wall, jacket, or liner), provided that:

(A) (No change.)

(B) the interstitial space between the protected component and the secondary containment device shall be free of any soil, backfill material, groundwater or any other water, or other substances, and the protected component shall be regularly inspected and tested for electrical isolation in accordance with the provisions in subsection (d)(1) of this section.

(4) - (7) (No change.)

(c) Cathodic protection systems.

(1) Factory-installed cathodic protection systems.

(A) (No change.)

(B) At a minimum, the factory-installed cathodic protection system shall include the following components:

(i) a suitable dielectric external coating or laminate, which shall thoroughly cover all exterior surfaces exposed to the soil, backfill, or groundwater or any other water, and which shall consist of materials which are compatible with the stored regulated substances;

(ii) - (iii) (No change.)

(2) - (4) (No change.)

(d) Requirements for other corrosion protection methods.

(1) Electrically isolated components.

(A) Except for jacketed tanks meeting the requirements of §334.45(b)(1)(F) of this title, any metal component of an UST system which is protected from corrosion by one of the electrical isolation methods described in subsection (b)(2) and (3) of this section, and which is not equipped with a cathodic protection system, shall be periodically inspected and tested to ensure that the metal component remains electrically isolated from the surrounding soil, backfill, groundwater or any other water, and from other metal components in accordance with one or more of the following procedures.

(i) - (iii) (No change.)

(B) (No change.)

(C) If the tests required in subparagraph (A) of this paragraph indicate that the metal component is no longer electrically isolated from the surrounding soil, backfill, groundwater or any other water, or from other metal components, a qualified corrosion specialist shall review the test results and thoroughly inspect the area of the metal component to ascertain the extent of electrical isolation and corrosion protection for the component.

(D) (No change.)

(2) (No change.)

(e) (No change.)

§334.50. Release Detection.

(a) - (c) (No change.)

(d) Allowable methods of release detection. Tanks in a UST system may be monitored for releases using one or more of the methods included in paragraphs (2) - (10) of this subsection. Piping in a UST system may be monitored for releases using one or more of the methods included in paragraphs (5) - (10) of this subsection. Any method of release detection for tanks and/or piping in this section shall be allowable only when installed (or applied), operated, calibrated, and maintained in accordance with the particular requirements specified for such method in this subsection.

(1) - (6) (No change.)

(7) Interstitial monitoring for double-wall UST systems. Equipment designed to test or monitor for the presence of regulated substance vapors or liquids in the interstitial space between the inner (primary) and outer (secondary) walls of a double-wall UST system may be used, subject to the following conditions and requirements.

(A) - (B) (No change.)

(C) The sampling, testing, or monitoring method shall be capable of detecting a breach or failure in the primary wall and the entrance of groundwater or any other water into the interstitial space due to a breach in the secondary wall of the double-wall tank or piping system within one month (not to exceed 35 days) of such breach or failure (whether or not a stored regulated substance has been released into the environment).

(8) - (10) (No change.)

(e) (No change.)

§334.54. Temporary Removal from Service.

(a) - (d) (No change.)

(e) Other requirements.

(1) - (4) (No change.)

(5) Financial assurance requirements for tanks temporarily removed from service. Note that §37.885 of this title (relating to Release from the Requirements) addresses release from financial assurance requirements, and that Texas Water Code, §26.352(e-2) and §37.867 of this title (relating to Duty to Empty Tanks After Termination of Financial Assurance) address the duty to empty tanks after termination of financial assurance.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6091

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SUBCHAPTER D. RELEASE REPORTING AND CORRECTIVE ACTION

30 TAC §334.71, §334.84

STATUTORY AUTHORITY

The amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule. TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The proposed amendments implement TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The proposed amendments also implement certain UST provisions of the federal Energy Policy Act of 2005.

§334.71. Applicability and Deadlines.

(a) (No change.)

(b) If the release was reported to the agency on or before December 22, 1998, the person performing the corrective action shall meet the following deadlines:

(1) - (5) (No change.)

(6) for sites that require either a corrective action plan or groundwater monitoring, have met all other deadlines under this subsection, and have submitted annual progress reports that demonstrate progress toward meeting closure requirements, a site closure request must be submitted to the executive director no later than September 1, 2011 [~~2007~~]. The request must be complete, as judged by the executive director.

(c) (No change.)

§334.84. Corrective Action by the Agency.

(a) The agency may undertake corrective action in response to a release or a threatened release if:

(1) - (3) (No change.)

(4) the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571; has been granted such extension by the executive director; has applied to the agency in writing on an agency application form not later than July 1, 2011 [~~2007~~], to have an eligible corrective action site placed in the Petroleum Storage Tank State Lead Program administered by the commission; and has agreed on the application form to allow access to that site to state personnel and state contractors. Once the executive director places such a site in the state lead program, the eligible owner or operator of that site is not liable to the commission for any corrective action costs incurred by the state lead program with regard to the site, unless the statutorily allowable maximum cost per site is exceeded; or

(5) (No change.)

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6091

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SUBCHAPTER F. ABOVEGROUND STORAGE TANKS

30 TAC §334.128

STATUTORY AUTHORITY

The amendment is proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state and to adopt rules repealing any statement of general applicability that interprets law or policy; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule. TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank.

The proposed amendment implements TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The proposed amend-

ments also implement certain UST provisions of the federal Energy Policy Act of 2005.

§334.128. Annual Facility Fees for Aboveground Storage Tanks (ASTs).

(a) Fee assessments.

(1) - (3) (No change.)

(4) Annual facility fees must be paid by check, certified check, or money order made payable to the Texas Commission on Environmental Quality. [~~"Texas Natural Resource Conservation Commission."~~] Payments must be mailed to the address specified in the billing statement.

(b) - (d) (No change.)

(e) Exception. An annual facility fee shall cease to be assessed, effective September 1, 2007, and shall not be assessed until such time as reinstated by the commission at an amount determined appropriate by the commission, however, prior owing tank fees are still due as previously described. In addition, at such time as the annual facility fee is reinstated by the commission, it will not be assessed for an AST which is owned by a common carrier railroad, as provided in the TWC, §26.344(g).

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
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For further information, please call: (512) 239-6091

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SUBCHAPTER H. REIMBURSEMENT PROGRAM

30 TAC §§334.301 - 334.303

STATUTORY AUTHORITY

These amendments are proposed under Texas Water Code (TWC), §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule. TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); TWC, §26.351, which directs the commission to adopt rules establishing the requirements for taking corrective action in response to a release from a UST or aboveground storage tank; and TWC, §26.3573, which allows the commission to use funds from the Petroleum Storage Tank Remediation (PSTR) Account to reimburse an eligible owner or operator or insurer for the expenses of corrective action or to pay the claim of a contractor hired by an eligible owner or operator to perform corrective action.

The proposed amendments implement TWC, §§26.351, 26.352, 26.3573, 26.3574, 26.358, 26.361, as amended by House Bills 1956 and 3554, 80th Legislature, 2007. The proposed amendments also implement certain UST provisions of the federal Energy Policy Act of 2005.

§334.301. Applicability of this Subchapter.

(a) - (b) (No change.)

(c) Expenses considered for payment--time frame in which corrective action performed. Subject to the other requirements of this subchapter, the expenses which may be considered for payment from the petroleum storage tank remediation fund are limited to expenses of corrective action which was performed for the owner or operator on or after September 1, 1987, and conducted in response to a confirmed release that was initially discovered and reported to the agency on or before December 22, 1998. Expenses for corrective action performed prior to September 1, 1987, are not subject to reimbursement or payment. No expenses for corrective action performed after September 1, 2005 will be reimbursed unless the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571 and has been granted such an extension by the executive director. The Petroleum Storage Tank Remediation (PSTR) Account may be used to reimburse an eligible owner or operator for corrective action performed under an extension before August 31, 2011 [~~2007~~]. No reimbursements will be made for corrective action expenses sought in claims submitted to the agency after March 1, 2012 [~~2008~~]. Under no circumstances will any reimbursements be made on or after September 1, 2012 [~~2008~~].

(d) - (h) (No change.)

§334.302. General Conditions and Limitations Regarding Reimbursement; Assignments.

(a) - (b) (No change.)

(c) No payments shall be made by the agency under this subchapter for:

(1) - (4) (No change.)

(5) any expenses related to corrective action performed after September 1, 2005, unless the owner or operator is eligible for an extension for corrective action reimbursement under Texas Water Code, §26.3571 and has been granted such an extension by the executive director. The Petroleum Storage Tank Remediation (PSTR) Account may be used to reimburse an eligible owner or operator for corrective action performed under an extension before August 31, 2011 [~~2007~~];

(6) any expenses related to corrective action contained in a reimbursement claim filed with the agency after March 1, 2012 [~~2008~~];

(7) any expenses on or after September 1, 2012 [~~2008~~]; or

(8) (No change.)

(d) - (k) (No change.)

§334.303. When to File Application.

(a) An application for reimbursement under this subchapter must be filed on or after January 17, 1990, but not after March 1, 2012 [~~2008~~].

(b) - (c) (No change.)

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

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Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 1. CENTRAL ADMINISTRATION
SUBCHAPTER A. PRACTICE AND PROCEDURES
DIVISION 3. SUPPORT SERVICES

34 TAC §1.71

(Editor's note: The text of the following section proposed for repeal will not be published. The section may be examined in the offices of the Comptroller of Public Accounts or in the Texas Register office, Room 245, James Earl Rudder Building, 1019 Brazos Street, Austin.)

The Comptroller of Public Accounts (comptroller) proposes the repeal of §1.71, concerning purchasing. The repeal is necessary because The Board of Control was dissolved, and the duties became part of the Texas Building and Procurement Commission (Commission). House Bill 3560, 80th Legislature, 2007, transferred the purchasing duties of Texas Building and Procurement Commission to the Comptroller of Public Accounts on September 1, 2007.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the repeal will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the repeal would benefit the public by streamlining the Texas Administrative Code. There would be no economic cost to the public. There is no significant anticipated economic cost to individuals who are required to comply with the repeal.

Comments on the proposal may be submitted to Cathy Navarro, Manager, Support Services Division, P.O. Box 12050, Austin, Texas 78711.

This repeal is proposed under Government Code, Title 4, §2155.0012, which allows the comptroller to administer this chapter relating to general purchasing rules.

The repeal implements Government Code, Title 4, §2155.011, which transfers the duties of the commission to the comptroller.

§1.71. Purchasing.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802023
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 475-0387

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34 TAC §1.72

The Comptroller of Public Accounts (comptroller) proposes an amendment to §1.72, concerning protest of agency purchases. The amendment is to correct the title of "Director of Administration Services" which is now "Director of Agency Administration" throughout the section.

John Heleman, Chief Revenue Estimator, has determined that for the first five-year period the rule will be in effect, there will be no significant revenue impact on the state or units of local government.

Mr. Heleman also has determined that for each year of the first five years the proposed amendment would benefit the public by specifying, for vendors of goods and services, the appropriate comptroller's office official to whom they would direct protests regarding the agency's solicitation, evaluation or award of contract. There would be no anticipated cost to the public. There is no significant anticipated economic cost to individuals who are required to comply with the rule amendment.

Comments on the proposal may be submitted to Cathy Navarro, Manager, Support Services Division, P.O. Box 12050, Austin, Texas 78711.

This amendment is proposed under Government Code, Title 4, §2155.067, which allows each state agency to adopt purchasing protest procedures.

The amendment implements Government Code, Title 4, §2155.0012, which allows the comptroller to adopt rules to administer this chapter.

§1.72. Protest of Agency Purchases.

(a) The following words and terms, when used in this subchapter, shall have the following meaning unless the context clearly indicates otherwise.

(1) Agency--The Office of the Comptroller of Public Accounts[~~, the elected official~~].

(2) Comptroller--Comptroller of Public Accounts.

(3) Deputy Comptroller--Deputy Comptroller of Public Accounts.

(4) Director of Agency Administration--Director of Agency Administration [~~Director of Administrative Services--Director of the Administrative Services~~] Division of the Comptroller of Public Accounts.

(5) General Counsel--General Counsel of the Comptroller of Public Accounts.

(6) Interested parties--All vendors who have submitted bids or proposals for the provision of goods or services pursuant to a contract with the Comptroller of Public Accounts.

(b) Any actual or prospective bidder, offeror, or contractor who considers himself to have been aggrieved in connection with the agency's solicitation, evaluation, or award of a contract may formally protest to the Director of Agency Administration[~~Administrative Services~~]. Such protests must be made in writing and received in

the office of the Director of Agency Administration [~~Administrative Services~~] within 10 working days after the protesting party knows, or should have known, of the occurrence of the action that is protested. Formal protests must conform to the requirements of this subsection and subsection (d) of this section, and will be resolved through use of the procedures that are described in subsections (e) through (i) of this section. The protesting party must mail or deliver copies of the protest to the agency and other interested parties.

(c) In the event of a timely protest under this section, the agency will not proceed further with the solicitation or award of the contract unless the Deputy Comptroller, after consultation with the using division and the Director of Agency Administration[~~Administrative Services~~], makes a written determination that the contract must be awarded without delay, to protect the best interests of the agency.

(d) A formal protest must be sworn and contain:

(1) a specific identification of the statutory or regulatory provision that the protesting party alleges has been violated;

(2) a specific description of each action by the agency that the protesting party alleges to be a violation of the statutory or regulatory provision that the protesting party has identified pursuant to paragraph (1) of this subsection;

(3) a precise statement of the relevant facts;

(4) a statement of any issues of law or fact that the protesting party contends must be resolved;

(5) a statement of the argument and authorities that the protesting party offers in support of the protest; and

(6) a statement that copies of the protest have been mailed or delivered to the agency and all other identifiable interested parties.

(e) The Director of Agency Administration [~~Administrative Services~~] may settle and resolve the dispute over the solicitation or award of a contract at any time before the matter is submitted on appeal to the General Counsel of the agency. The Director of Agency Administration [~~Administrative Services~~] may solicit written responses to the protest from other interested parties.

(f) If the protest is not resolved by mutual agreement, the Director of Agency Administration [~~Administrative Services~~] will issue a written determination that resolves the protest.

(1) If the Director of Agency Administration [~~Administrative Services~~] determines that no violation of statutory or regulatory provisions has occurred, then the director [~~Director~~] shall inform the protesting party, the agency, and other interested parties by letter that sets forth the reasons for the determination.

(2) If the Director of Agency Administration [~~Administrative Services~~] determines that a violation of any statutory or regulatory provisions has occurred in a situation in which a contract has not been awarded, then the director [~~Director~~] shall inform the protesting party, the agency, and other interested parties of that determination by letter that details the reasons for the determination and the appropriate remedy.

(3) If the Director of Agency Administration [~~Administrative Services~~] determines that a violation of any statutory or regulatory provisions has occurred in a situation in which a contract has been awarded, then the director [~~Director~~] shall inform the protesting party, the agency, and other interested parties of that determination by letter that details the reasons for the determination. This letter may include an order that declares the contract void.

(g) The protesting party may appeal a determination of a protest by the Director of Agency Administration [~~Administrative Services~~] to the General Counsel of the agency. An appeal of the director's [~~Director's~~] determination must be in writing and received in the office of the agency's General Counsel by not later than 10 working days after the date on which the director [~~Director~~] has sent written notice of his determination. The scope of the appeal will be limited to review of the director's [~~Director's~~] determination. The protesting party must mail or deliver to the agency and all other interested parties a copy of the appeal, which must contain a certified statement that such copies have been provided.

(h) The General Counsel may refer the matter to the Deputy Comptroller for consideration or may issue a written decision that resolves the protest.

(i) The following requirements shall apply to a protest that the General Counsel refers to the Deputy Comptroller.

(1) The General Counsel will deliver copies of the appeal and any responses by interested parties to the Deputy Comptroller.

(2) The Deputy Comptroller may consider any documents that agency staff or interested parties have submitted.

(3) The Deputy Comptroller will issue a written letter of determination of the appeal, to the parties which shall be final.

(A) A protest or appeal that is not filed timely will not be considered unless good cause for delay is shown or the Deputy Comptroller determines that an appeal raises issues that are significant to agency procurement practices or procedures in general.

(B) A written decision that either the Deputy Comptroller or the General Counsel has issued shall be the final administrative action of the agency.

(j) The agency will maintain all documentation on the purchasing process that is the subject of a protest or appeal in accordance with the agency's retention schedule.

This agency hereby certifies that the proposal has been reviewed by legal counsel and found to be within the agency's legal authority to adopt.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802024
Martin Cherry
General Counsel
Comptroller of Public Accounts
Earliest possible date of adoption: June 1, 2008
For further information, please call: (512) 475-0387

WITHDRAWN RULES

Withdrawn Rules include proposed rules and emergency rules. A state agency may specify that a rule is withdrawn immediately or on a later date after filing the notice with the Texas Register. A proposed rule is withdrawn six months after the date of publication of the proposed rule in the Texas Register if a state agency has failed by that time to adopt, adopt as amended, or withdraw the proposed rule. Adopted rules may not be withdrawn. (Government Code, §2001.027)

TITLE 22. EXAMINING BOARDS

PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 335. PROFESSIONAL TITLE

22 TAC §335.1

The Texas Board of Physical Therapy Examiners withdraws the proposed amendments to §335.1 which appeared in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9519).

Filed with the Office of the Secretary of State on April 16, 2008.

TRD-200801983
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: April 16, 2008
For further information, please call: (512) 305-6900

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ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

TITLE 1. ADMINISTRATION

PART 15. TEXAS HEALTH AND HUMAN SERVICES COMMISSION

CHAPTER 355. REIMBURSEMENT RATES

SUBCHAPTER C. REIMBURSEMENT METHODOLOGY FOR NURSING FACILITIES

1 TAC §355.310

The Health and Human Services Commission (HHSC) adopts new §355.310, concerning the reimbursement methodology for customized power wheelchairs (CPWCs) and associated physical or occupational therapy evaluations for qualified Texas nursing facility residents, without changes to the proposed rule as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 821), and will not be republished.

The new rule describes the reimbursement methodology for CPWCs and associated physical or occupational therapy evaluations for qualified Texas nursing facility residents authorized under 40 TAC §19.2614, which was adopted by the Texas Department of Aging and Disability Services (DADS) in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3301). DADS is adding CPWCs as an item reimbursable by Medicaid for qualified Texas nursing facility residents as part of the settlement agreement in the lawsuit filed in federal court against HHSC and DADS entitled *LeCompte, et al. v. Hawkins, et al.*

The 30-day comment period ended March 1, 2008, and HHSC did not receive any comments on the proposed rule.

The new rule is adopted under Texas Government Code §531.033, which provides the Executive Commissioner of HHSC with broad rulemaking authority; and Texas Human Resources Code §32.021 and Texas Government Code §531.021(a), which authorize HHSC to administer the federal medical assistance (Medicaid) program in Texas.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 17, 2008.

TRD-200802009
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Effective date: May 8, 2008
Proposal publication date: February 1, 2008
For further information, please call: (512) 424-6900

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TITLE 4. AGRICULTURE

PART 1. TEXAS DEPARTMENT OF AGRICULTURE

CHAPTER 7. PESTICIDES

SUBCHAPTER C. LICENSING

4 TAC §7.23, §7.24

The Texas Department of Agriculture (the department) adopts amendments to §7.23 and §7.24, concerning licensing and regulation of pesticide applicators. Section 7.24 is adopted with changes to the proposal published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1673). Section 7.23 is adopted without changes and will not be republished. The amendment to §7.23 is made to comply with §76.111 of the Texas Agriculture Code, which requires that each applicator business shall file with the department a liability insurance policy, certification of a policy or other proof of financial responsibility considered acceptable to the department protecting persons who may suffer damages as a result of the operations of the applicator business, its employees, and its agents. The department periodically receives requests from applicator businesses to accept other forms of financial responsibility, such as bonds or letters of credit, to satisfy the requirements of the Texas Agriculture Code. The department has determined that liability insurance is reasonably available and affordable and that no other form of financial responsibility will be accepted as proof of financial responsibility. The department has adopted this amendment to clarify its existing practice. The amendment to §7.24 is made in response to a request from the Texas Agricultural Aviation Association (TAAA) to strengthen the CEU requirements for commercial and noncommercial applicators certified in the aerial application category who operate aerial aircraft to apply pesticides. The TAAA has requested that the department require that these applicators acquire CEUs in specific categories to ensure the safety of pilots and enhance the protection of the public by having applicators attend CEU courses that are specific to the nature of their industry. The required number of CEUs will not be increased by this amendment. The amendments to §7.24 will be effective January 1, 2009, in order to allow applicators to use the CEUs that they may have already obtained in order to renew their license and to allow course sponsors time to develop appropriate course materials. The amendment to §7.24 at paragraph (t)(3) is adopted with changes made to correct a typographical error. The reference to paragraph (2) has been changed to paragraph (1). The amendment to §7.23, relating to applicator business proof of financial responsibility, adds language to clarify that a liability insurance policy is the only acceptable form of proof of financial re-

sponsibility for applicator businesses, which is the department's current practice. The amendment to §7.24, relating to applicator recertification, adds language that requires that commercial or noncommercial applicators that are certified in the aerial application category must obtain three of the required five continuing education units (CEUs) in laws and regulations, drift minimization, and pesticide safety activities addressing human factors.

Comments on the proposal were received both in writing and at public hearings held by the department on the proposal. All comments received were regarding the proposed amendments to §7.24, and all were in support of the proposal. No comments were received regarding the proposed amendments to §7.23. The Texas Agricultural Aviation Association commented that the proposed amendments to §7.24 are needed, will enhance the safety of pilots and the public, and will require continuing education that is directly related to the type of application being made. Other comments submitted by individual commercial pesticide applicators include that the higher standard for continuing education requirements will encourage good stewardship, that the changes will not adversly affect agricultural pilots in Texas since the required programs are available and affordable, and that many applicators are already obtaining credits that will qualify under the new requirement.

The amendments are adopted under the Texas Agriculture Code, §76.004, which provides the Texas Department of Agriculture with the authority to adopt rules to carry out the provisions of Chapter 76 of the Texas Agriculture Code.

§7.24. Applicator Recertification.

(a) All applicators must meet recertification requirements through completion of approved continuing education activities.

(b) Approved activities may include lectures, panel discussions, organized video or film with live instruction, field demonstrations, or other activities approved by the department.

(c) Each activity must be approved by the department. No activity may claim to be approved or accepted by the department or use any other such term that would lead an applicator to believe that it has been approved by the department for recertification unless it is so approved.

(d) The department shall assign no more than one continuing education unit (CEU) for each hour of net actual instruction time presented at an approved activity.

(e) To be eligible for approval, the department will require:

(1) that the activity have significant educational or practical content to maintain appropriate levels of competency;

(2) that the activity be conducted by a university, a governmental agency, an association, or a private independent nonapplicator business;

(3) that each activity has a recordkeeping procedure for verifying applicator attendance using department forms or approved formats;

(4) that activities cover one or more of the following topics pertaining to pesticides:

(A) label and labeling comprehension;

(B) safety factors;

(C) environmental consequences;

(D) pest features;

(E) integrated pest management strategies/pest management practices;

(F) pesticide factors;

(G) equipment characteristics;

(H) application techniques/drift minimization;

(I) laws and regulations;

(J) biotechnology/transgenic crops; or

(K) business ethics; and

(5) the activity is able to comply with all applicable federal and state laws, including the Americans With Disabilities Act (ADA) requirements for access to activities.

(f) The department may consider for approval "correspondence activities" such as videos, interactive internet and/or other activities approved by the department. To be eligible for approval the department will require:

(1) that the course sponsor complies with the specifications and requirements listed under §7.24(a)-(e) of this section; and

(2) that the activity include an open book measure of competency approved by the department.

(g) For commercial and noncommercial applicators only, the department may consider for approval, an intensive specialized training, equivalent to a maximum of a three-year recertification credit. Correspondence activities will not be allowed for this method of acquiring CEUs.

(h) Prior approval shall not be required for applicator recertification courses of up to three CEUs conducted by Extension faculty or department personnel for any pesticide applicator, provided that all other requirements for course content and records are met. The department may enter into a memorandum of agreement with Extension regarding the specific requirements for applicator recertification. Correspondence activities are excluded from this provision.

(i) Department personnel may monitor all approved activities, and all fees charged by the sponsor shall be waived for department personnel who monitor the recertification activity.

(j) The department may deny, revoke, or refuse to renew approval for any or all courses of a sponsor if the sponsor fails to file a timely activity report, fails to provide the quality of activity approved by the department, or fails to comply with any other requirements that are a basis for approval or that are a part of these rules.

(k) The department may enter into a memorandum of agreement with another state or non-profit professional society or association to recognize the state's pesticide applicator recertification or the society's professional recertification for satisfaction of the requirements of this section for commercial, noncommercial and private applicator recertification only if:

(1) the standards for recertification meet or exceed the standards for the one-year or five-year recertification periods as set out in this section; and

(2) the agreement reduces duplication of effort and does not increase the recordkeeping burden of the department.

(l) Each continuing education activity shall be approved for one calendar year only.

(m) In order for a recertification activity to be approved by the department, the sponsor must:

(1) submit a completed department-prepared application form;

(2) provide any additional material relevant to the activity which is requested by the department; and

(3) submit the application and information required by the department at least 30 days in advance of the first date of the activity. The department may waive the 30-day provision providing all other requirements are met. The department will respond to the sponsor within ten days of receipt of the application and approve, reject, or request additional information.

(n) Sponsors who wish to continue approval must file for renewal annually on a form prepared by the department.

(o) Sponsors of approved activities shall:

(1) prepare a roster of applicators that attend the activity which contains, at a minimum, the date, course number, the pesticide applicator's name and current license or certificate number and the location of the training;

(2) distribute a completion certificate at the time of the activity to applicators who successfully complete an activity, which shall indicate the name of the sponsor, the date, county and name of the activity, the amount and type of credit earned, and the assigned course number;

(3) send the activity rosters to the department within 14 days after the end of an activity. The rosters must be on department forms or approved formats; and

(4) ensure that CEUs awarded correspond proportionately to the net instruction time.

(p) Sponsors of approved correspondence activities shall:

(1) prepare a roster of applicators who complete the activity which contains, at a minimum, the date, course number, the pesticide applicator's name and current license or certificate number and the location of the training;

(2) distribute a completion certificate in a timely manner to applicators who successfully complete an activity, which shall indicate the name of the sponsor, the date, county and name of the activity, the amount and type of credit earned, and the assigned course number;

(3) send the activity rosters to the department within 14 days after the end of an activity. The rosters must be on department forms or in a department approved format;

(4) ensure that CEUs awarded correspond proportionately to the net instruction time; and

(5) ensure the establishment of procedures to prohibit an individual from repeating the sponsor's course in two consecutive recertification periods.

(q) Governmental agencies may enter into an agreement with the department for annual submission of recertification records of agency employees attending a recertification program approved for the agency by the department.

(r) No credit will be given for time used to promote the sponsor or other activities of the sponsor or for time used for organizational, political, procedural, or other nonrelevant activities.

(s) Applicators will recertify through a self-certification program. Each applicator will be required to maintain proof of the number of CEUs necessary to renew a license or certificate. Certificates of completion verifying attendance at approved activities during the previous licensing period must be maintained by the applicator for a period of 12 months after the most recent renewal of their license or certificate. The department may audit the CEUs an applicator has obtained during an onsite inspection or by letter requesting that copies of certificates of completion be mailed to the department. Certificates of completion will be compared with course rosters on file with the department. Credits obtained at a single course cannot be split or divided between licensing periods.

(t) Except as provided in paragraph (1) of this subsection, each commercial or noncommercial applicator must obtain at least five CEUs prior to the expiration of the license. A minimum of one hour each must be obtained from two of the following categories: integrated pest management, laws and regulations or drift minimization.

(1) For commercial or noncommercial applicators certified in the aerial application category, three of the required five CEUs must be associated with aerial application operations to include one hour each in laws and regulations, drift minimization and pesticide safety activities addressing human factors.

(2) A commercial or noncommercial applicator may not recertify their license using department-approved correspondence activities for two consecutive years.

(3) Paragraph (1) of this subsection is effective beginning January 1, 2009.

(u) An applicator who becomes unlicensed in any licensing year may not be relicensed for 12 months unless all CEUs required for the last year of licensing are completed. Until the 12-month period has elapsed, applicators are prohibited from retesting under §7.22 of the title (relating to Licensing of Applicators).

(v) Private applicators must recertify as follows:

(1) Each licensed private applicator must obtain 15 CEUs within a five-year period including at least two credits in laws and regulations and two credits in integrated pest management.

(2) Each licensed private applicator must obtain 15 CEUs prior to their license expiration date.

(3) Private applicators issued a certificate prior to January 10, 1989, may fulfill their recertification requirement on a one-time only basis by completing the Extension private applicator training program, attaining a passing score on the private applicator test, and obtaining a private applicator license. Certified private applicators who choose not to license but wish to maintain certification under a certificate issued prior to January 10, 1989, will be required to recertify as specified for licensed private applicators in this subsection.

(4) Private applicators have the option of forgoing continuing education requirements for a recertification period by following these procedures:

(A) Take and pass a comprehensive examination administered by the department which will contain questions relevant to those topics which would be covered at various continuing education activities. A certificate of completion worth 15 CEUs will be issued by the department upon a passing score being attained by the applicator.

(B) If the applicator fails the examination, subsequent attempts will be allowed until a passing score is attained. If a passing score is not attained, the applicator may obtain the required CEUs pursuant to this subsection.

(C) Pay a required fee of $50 for each examination.

(5) A private applicator may not obtain more than 10 CEUs through correspondence activities in any five-year recertification cycle.

(w) Failure to comply with the continuing education requirements for commercial, noncommercial and private applicators will:

(1) result in nonrenewal of an applicator's license or certification until the necessary credits for continuing education are attained;

(2) prohibit applicators from retesting for a new license in lieu of meeting recertification requirements until one year after the expiration of their license;

(3) require the applicator to take and pass comprehensive department examinations for general knowledge and for each category in which the applicator seeks to be licensed if the applicator does not recertify and renew in one year following the expiration of the license;

(4) require retraining of commercial, noncommercial and private applicators for categories or subcategories requiring special training if the applicator does not recertify and renew in one year following the expiration of the license; and

(5) subject a noncompliant applicator to administrative, civil or criminal penalties and/or license or certificate revocation, suspension, modification or probation for failure to comply with continuing education requirements if the applicator operates under a license that has not been renewed.

(x) An applicator may seek credit for a continuing education activity that has not been submitted by the sponsor to the department, and the department will assign the number of credits for the activity. To be eligible for accreditation, the following conditions must be met:

(1) the activity must contain course content of the highest standards;

(2) the activity must be sponsored by an in-state or out-of-state institution of higher education, or an out-of-state regional or national association, or the state or federal government;

(3) the activity must be in an area directly related to the activities of a commercial, noncommercial or private applicator;

(4) the applicator shall provide the department with sufficient information describing activity content including the time allotted to each aspect of the activity, identification of sponsor, instructor's name and address, proof of attendance, date, time, and place of the activity; and

(5) the information for the desired credit must be submitted within 60 days after completion of the activity.

(y) An applicator may file a written request for an extension of time for compliance with any deadline in these rules. Such request for extension may be granted by the department if the applicator files appropriate documentation to show good cause for failure to comply timely with the requirements of this subsection. Good cause means illness, extended medical disability, or other extraordinary hardship which is beyond the control of the person seeking the extension.

(z) Applicators licensed as both private and commercial or noncommercial may satisfy requirements for private applicator recertification by meeting the recertification requirements for commercial and noncommercial applicators.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2008.

TRD-200801962

Dolores Alvarado Hibbs
Deputy General Counsel
Texas Department of Agriculture
Effective date: May 4, 2008
Proposal publication date: February 29, 2008
For further information, please call: (512) 463-4075

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TITLE 7. BANKING AND SECURITIES

PART 5. OFFICE OF CONSUMER CREDIT COMMISSIONER

CHAPTER 84. MOTOR VEHICLE INSTALLMENT SALES

SUBCHAPTER A. SALES FINANCE LICENSES

7 TAC §§84.101 - 84.113

The Finance Commission of Texas (commission) adopts the repeal of 7 TAC §§84.101 - 84.113, concerning Sales Finance Licenses. The repeal is adopted without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1674).

The commission has determined that these rules more effectively belong in different locations within Chapter 84 in order to better track the organization of Texas Finance Code, Chapter 348. Therefore, the repeal of these rules is being adopted and new (relocated) rules are adopted elsewhere in this issue of the *Texas Register*.

The commission received no written comments on the proposed repeal.

The repeal is adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 authorizes the commission to adopt rules for the enforcement of the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the adopted repeal are contained in Texas Finance Code, Chapter 348.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802048
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Effective date: May 8, 2008
Proposal publication date: February 29, 2008
For further information, please call: (512) 936-7611

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7 TAC §§84.101 - 84.104

The Finance Commission of Texas (commission) adopts new §§84.101 - 84.104, concerning General Provisions, with regard

to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. The new rules are adopted with changes to §§84.101, 84.102, and 84.104, and without changes to §84.103, as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1674).

The commission received one written comment on the proposal from McGinnis, Lochridge & Kilgore, L.L.P. on behalf of GMAC LLC. The commenter suggests one clarification regarding §84.104, Knowledge of Laws and Regulations Required. The specific comments are addressed following the individual purpose of the provision at issue.

The purpose of the new operational rules is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. The following paragraphs outline the individual purposes of each rule. In addition to the changes made to certain rules in response to the official comment received, the agency has made further revisions resulting from informal comments received and from internal agency review. The explanations for all changes made since the proposal are provided below the purposes for the revised sections.

Section 84.101 sets out the purpose and scope of the chapter. Since the proposal, the terms "retail sellers" and "holders" have been relocated to the Definitions section (see §84.102, which follows). This relocation is a formatting change, as these terms are more appropriately included under definitions. The introductory phrase, "This chapter applies to" has been moved up into subsection (b), as opposed to its use in both paragraphs (1) and (2), resulting in more streamlined wording. Additionally, the explanatory phrase "from licensing" has been added after the word "exempted" in paragraph (2), clarifying the reference to the exemptions from licensing listed by Texas Finance Code, Chapter 348.

Section 84.102 (some definitions contained in former §84.204, some new definitions) outlines general definitions to be used throughout the chapter in order to ensure consistent treatment and application of defined terms. The new definitions are intended to provide clarification for licensees and to aid in enforcement and compliance efforts.

Since the proposal, in the definitions for "default charge or late charge" (§84.102(6)) and "deferment charge" (§84.102(7)), the word "finance" has been deleted in order to prevent any confusion with the terminology used in the Truth in the Lending Act.

As noted under §84.101, the term "holder" has been relocated to §84.102 since the proposal. The concept contained in the purpose and scope section is now echoed as definition §84.102(8), so that stakeholders will most easily be able to locate the meaning of this term. Also, a clarifying sentence has been added to the existing definition of the term "seller" (§84.102(6)), providing that "seller" is synonymous with the term "retail seller." The more reader friendly term "seller" is maintained in the rules for plain language purposes.

Section 84.103 provides for the responsibility of licensees for the acts of their agents.

Section 84.104 requires that each officer and director be familiar with Texas Finance Code, Chapter 348 and its implementing regulations applicable to the licensee's business. The rule also requires that employees and agents be familiar with the provisions of Texas Finance Code, Chapter 348 and its implementing regulations that are related to their responsibilities and duties, as provided by the licensee through training or an internal system of controls.

In response to informal comments received regarding the proposal, some formatting and clarifying changes have been made to §84.104. First, the phrase "shall have a working knowledge of" has been replaced with the phrase "must be familiar with" in order to echo the affirmation made by licensees during the application process. Second, the entire section has been modified to limit the knowledge requirement to Texas Finance Code, Chapter 348, and its implementing regulations.

In reference to §84.104, the commenter states: "An employee should only be required to have knowledge of the Texas law if the employee's regular employment duties involve transactions subject to the Texas law." The commenter offers some clarifying phrases that would "limit the requirement to know the applicable portions of the Texas Finance Code to those persons whose employment duties include regularly dealing with retail buyers regarding matters covered under the Code." The commenter further explains: "Most major motor vehicle finance companies, including GMAC, use internal controls to facilitate compliance with the law. GMAC's attorneys and managers put controls in place that limit charges and conduct to that allowed by the law of the various states." The commenter also suggests an addition to allow for compliance by employees and agents through internal controls.

The commission recognizes the commenter's concern in relation to so-called "front line" employees or agents working for large motor vehicle finance companies that operate in several states or worldwide. The commission agrees with the need for clarification as requested by the commenter and has made the following changes for this adoption. First, this section has been separated into three subsections, with subsection (a) applying only to officers and directors, and subsection (b) applying only to employees and agents. For employees and agents, new subsection (b) narrows the knowledge requirement to Chapter 348 provisions and regulations "that are related to their duties and responsibilities."

Second, the commission has decided to include a sentence in subsection (b) utilizing the commenter's concept regarding internal controls. Thus, although different from the commenter's suggested rule text, instructive language has been added to reflect the agency's policy that employees and agents may demonstrate compliance by adhering to the training or internal system of controls provided by the licensee.

These new sections are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

These rules affect Texas Finance Code, Chapter 348.

§84.101. Purpose and Scope.

(a) Purpose. The purpose of this chapter is to assist in the administration and enforcement of Texas Finance Code, Chapter 348.

(b) Scope. This chapter applies to:

(1) all persons engaged in the business of selling motor vehicles to retail buyers in transactions in which a retail buyer purchases a motor vehicle from a retail seller and agrees with the retail seller to

pay part or all of the cash price in one or more deferred installments; and

(2) all persons that acquire or otherwise receive retail installment sales contracts unless specifically exempted from licensing by Texas Finance Code, Chapter 348.

§84.102. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Accrual method--A method to compute a finance charge and apply the finance charge to the unpaid principal balance. Both the true daily earnings method and the scheduled installment earnings method are accrual methods.

(2) Add-on method--A method for calculating a precomputed time price differential charge in which the retail buyer agrees to pay the total of payments. The total of payments includes both the principal balance of the contract and the time price differential charge. The add-on time price differential charge is calculated at the inception of the contract on the principal balance for the full term, as if the principal balance of the contract did not decline over the term of the contract.

(3) Contract rate--The annual time price differential rate that may be stated in a retail installment sales contract, and that accrues or is assessed against the principal balance that is subject to a finance charge for the term of the contract. The contract rate cannot exceed the daily rate converted to an annualized rate.

(4) Creditor--The seller or any subsequent holder or assignee of the retail installment sales contract.

(5) Daily rate--The rate authorized under Texas Finance Code, §348.105, or the simple rate equivalent of the rate applicable to the contract under Texas Finance Code, §348.104, computed on a daily basis using a 365-day calendar year.

(6) Default charge or late charge--The additional charge for a late payment on a contract.

(7) Deferment charge--The payment of an additional charge to defer the payment date of a scheduled payment on a contract.

(8) Holder--Holder includes retail sellers as well as any person who subsequently purchases, acquires, or otherwise receives the retail installment sales contract. All holders are creditors.

(9) Irregular payment contract--A contract:

(A) that is payable in installments that are not consecutive, monthly, and substantially equal in amount; or

(B) the first scheduled installment of which is due later than one month and 15 days after the date of the contract.

(10) Licensee--Any person who has been issued a motor vehicle sales finance license pursuant to Texas Finance Code, Chapter 348.

(11) Principal balance subject to finance charge--The principal balance used in the determination or calculation of the time price differential charge.

(A) Sales tax advanced transaction--In a sales tax advanced transaction, the principal balance subject to a finance charge is computed by:

(i) adding:

(I) the cash price of the vehicle;

(II) the amount of the authorized itemized charges;

(III) sales tax;

(IV) an authorized and properly disclosed documentary fee;

(V) an amount authorized under Texas Finance Code, §348.404(b); and

(ii) subtracting from the results under clause (i) of this subparagraph the amount of the retail buyer's down payment in money, goods, or both.

(B) Sales tax deferred transaction--In a sales tax deferred transaction, the principal balance subject to a finance charge does not include the deferred sales tax. The principal balance subject to a finance charge is computed by:

(i) adding:

(I) the cash price of the vehicle (excluding sales tax);

(II) the amount of the authorized itemized charges (excluding sales tax);

(III) an authorized and properly disclosed documentary fee;

(IV) an amount authorized under Texas Finance Code, §348.404(b); and

(ii) subtracting from the results under clause (i) of this subparagraph the amount of the retail buyer's down payment in money, goods, or both.

(12) Regular payment contract--Any contract that is not an irregular payment contract.

(13) Scheduled installment earnings method--The scheduled installment earnings method is a method to compute the finance charge by applying a daily rate to the unpaid principal balance as if each payment will be made on its scheduled installment date. A payment received before or after the due date does not affect the amount of the scheduled reduction in the unpaid principal balance. Under this method, a finance charge refund is calculated by deducting the earned finance charges from the total finance charges. If prepayment in full or demand for payment in full occurs between payment due dates, a daily rate equal to 1/365th of the annual rate is multiplied by the unpaid principal balance. The result is then multiplied by the actual number of days from the date of the previous scheduled installment through the date of prepayment or demand for payment in full to determine earned finance charges for the abbreviated period. In addition to the earned finance charges calculated in this paragraph, the creditor may also earn a $150 acquisition fee for a heavy commercial vehicle, or a $25 fee for other vehicles, so long as the total of the earned finance charges and the acquisition fee do not exceed the finance charge disclosed in the contract. The creditor is not required to refund unearned finance charges if the refund is less than $1.00. The scheduled installment earnings method may be used with either an irregular payment contract or a regular payment contract. The computation of finance charges must comply with the U.S. rule as defined in Appendix J of 12 C.F.R. Part 226 (Regulation Z).

(14) Sales tax advanced transaction--A retail installment transaction in which a retail seller remits the entire amount of the sales tax to the appropriate taxing authority within 20 working days of the sale.

(15) Sales tax deferred transaction--A retail installment transaction in which a retail seller or a qualified related finance com-

pany collects sales tax from the retail buyer and remits the tax under Tax Code, §152.047 to the Comptroller of Public Accounts.

(16) Seller--The seller of the motor vehicle. This term is synonymous with the term "retail seller."

(17) Sum of the periodic balances method (Rule of 78s).

(A) Under this method, the finance charge refund is calculated as follows:

(i) Subtract an acquisition fee not greater than $150 for a heavy commercial vehicle, or $25 for other vehicles, from the total finance charge.

(ii) Multiply the amount computed in clause (i) of this subparagraph by the refund percentage computed below. The result is the finance charge refund.

(iii) Compute the refund percentage by:

(I) Computing the sum of the unpaid monthly balances under the contract's schedule of payments beginning:

(-a-) On the first day, after the date of the prepayment or demand for payment in full; that is, the date of a month that corresponds to the date of the month that the first installment is due under the contract; or

(-b-) If the prepayment or demand for payment in full is made before the first installment date under the contract, one month after the date of the second scheduled payment of the contract occurring after the prepayment or demand;

(II) Dividing the result in subclause (I) of this clause by the sum of all of the monthly balances under the contract's schedule of payments.

(B) As an alternative for heavy commercial vehicles, as defined in the Texas Finance Code, the sum of the periodic balances method may be computed as follows:

(i) Multiply the total finance charge by a refund percentage determined as follows:

(I) Compute the sum of the unpaid monthly balances under the contract's schedule of payments beginning:

(-a-) On the first day, after the date of the prepayment or demand for payment in full; that is, the date of a month that corresponds to the date of the month that the first installment is due under the contract; or

(-b-) If the prepayment or demand for payment in full is made before the first installment date under the contract, one month after the date of the second scheduled payment of the contract occurring after the prepayment or demand;

(II) Divide the result in subclause (I) of this clause by the sum of all of the monthly balances under the contract's schedule of payments.

(ii) From the result derived in clause (i) of this subparagraph, deduct an acquisition fee not to exceed $150.

(C) The creditor is not required to give a finance charge refund if it would be less than $1.00.

(D) The sum of the periodic balances method may not be used with an irregular payment contract.

(18) True daily earnings method--The true daily earnings method is a method to compute the finance charge by applying a daily rate to the unpaid principal balance. The daily rate is 1/365th of the equivalent contract rate. The earned finance charge is computed by multiplying the daily rate of the finance charge by the number of days the actual unpaid principal balance is outstanding. Payments are credited as of the time received; therefore, payments received prior to the scheduled installment date result in a greater reduction of the unpaid principal balance than the scheduled reduction, and payments received after the scheduled installment date result in less than the scheduled reduction of the unpaid principal balance. The computation of finance charges must comply with the U.S. rule as defined in Appendix J of 12 C.F.R. Part 226 (Regulation Z).

(19) U.S. Rule--The ruling of the United States Supreme Court in Story v. Livingston, 38 U.S. (13 Pet.) 359, 371 (1839) that, in partial payments on a debt, each payment is applied first to finance charge and any remainder reduces the principal. Under this rule, accrued but unpaid finance charge cannot be added to the principal and interest cannot be compounded.

(20) Vehicle--A motor vehicle as defined by Texas Finance Code, §348.001(4).

§84.104. Knowledge of Laws and Regulations Required.

(a) Each officer and director of a licensee must be familiar with Texas Finance Code, Chapter 348 and its implementing regulations.

(b) Employees and agents of a licensee are responsible for being familiar with the provisions of Texas Finance Code, Chapter 348 and its implementing regulations that are related to their duties and responsibilities, as provided by the licensee through training or an internal system of controls. An employee or agent may demonstrate compliance with this section through adherence to the training or internal system of controls provided by the licensee.

(c) This section applies to the listed parties to the extent that the individual has contact with retail buyers or potential retail buyers, or has responsibility for compliance with Texas Finance Code, Chapter 348, or its implementing regulations governing the licensee's business.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802044
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7611

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SUBCHAPTER B. INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §§84.201 - 84.208, 84.210

The Finance Commission of Texas (commission) adopts the repeal of 7 TAC §§84.201 - 84.208 and §84.210, concerning Installment Sales Contract Provisions. The repeal is adopted without changes to the proposal as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1677).

The commission has determined that these rules more effectively belong in different locations within Chapter 84 in order to better track the organization of Texas Finance Code, Chapter 348. Therefore, the repeal of these rules is being adopted and new (relocated) rules are adopted elsewhere in this issue of the

Texas Register. Due to pending amendments, §84.209 will be relocated as a part of rule proposals in the near future.

The commission received no written comments on the proposed repeal.

The repeal is adopted under Texas Finance Code, §11.304, which authorizes the commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 authorizes the commission to adopt rules for the enforcement of the motor vehicle installment sales chapter.

The statutory provisions (as currently in effect) affected by the adopted repeal are contained in Texas Finance Code, Chapter 348.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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Leslie L. Pettijohn
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Office of Consumer Credit Commissioner
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For further information, please call: (512) 936-7611

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SUBCHAPTER D. ACQUISITION OF CONTRACT OR BALANCE

7 TAC §84.401

The Finance Commission of Texas (commission) adopts new §84.401, concerning Acquisition of Contract or Balance, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. The new rule is adopted with changes to the proposal published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1677).

The purpose of this new operational rule is to conform the commission's rules to current practice, to provide clarification for licensees required to comply with the rules, and to provide more specific guidance for the examination process. Subsequent to the proposal, the agency has made revisions resulting from internal agency review. The explanation for these changes is provided below the following paragraph outlining the individual purpose of the rule.

Section 84.401 outlines a person's authority to acquire a retail installment sales contract or an outstanding balance, requiring either a license or exemption under Texas Finance Code, Chapter 348.

Since the proposal, proposed subsection (b) from §84.612 published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1678) has been relocated to become §84.401(b). The language of §84.401(b) contained in this adoption is identical to that in proposed §84.612(b); however, it was determined that the securitization concept would more appropriately be included under the Acquisition of Contract or Balance section, as opposed to its proposed (and former) location under Implementation Provisions of Licensing.

The commission received no written comments on the proposal.

This new section is adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

This rule affects Texas Finance Code, Chapter 348.

§84.401. Acquisition of Contract or Balance.

(a) A person may not acquire a retail installment sales contract or an outstanding balance under a retail installment sales contract unless the person holds a license under Texas Finance Code, Chapter 348 or is exempt from licensing under Texas Finance Code, Chapter 348.

(b) Securitization of transactions. In the case of securitized transactions, such as a transaction in which motor vehicle retail installment sales contracts are held in trust or similar structure with participatory interests in the structure transferred to investors, the licensing requirements may be fulfilled either by the trust or other securitization entity or by the servicer that is responsible for servicing the contracts included in the securitized entity.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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SUBCHAPTER F. LICENSING

7 TAC §§84.601 - 84.616

The Finance Commission of Texas (commission) adopts new §§84.601 - 84.616, concerning Licensing, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. The new rules are adopted with changes to §§84.602, 84.604, 84.605, 84.610, 84.612, and 84.615, and without changes to §§84.601, 84.603, 84.606 - 84.609, 84.611, 84.613 - 84.614, and 84.616, as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1678).

The commission received one written comment on the proposal from McGinnis, Lochridge & Kilgore, L.L.P. on behalf of GMAC LLC. The commenter requests changes to three interrelated sections concerning the issue of disclosure of principal parties for new applications, transfer requirements, and notification of changes in ownership for parties beyond the parent level. The specific comments regarding each rule are addressed following the individual purpose of the provision at issue.

These rules regarding licensing are being relocated and reorganized. The agency believes that the reorganization will benefit licensees in that these rules will be easier to find in a more logical location and order which better tracks the organization of Texas Finance Code, Chapter 348. The relocated rules are substantially similar to the rules being repealed, as found in 7 TAC §§84.101 - 84.113, concerning Sales Finance Licenses. The

commission's adopted repeal of these sections is published elsewhere in this issue of the *Texas Register*.

The agency is also adopting two new rules within the relocated Licensing subchapter (Subchapter F): §84.615, concerning Applications and Notices as Public Records, and §84.616, concerning License Display.

With regard to the relocated licensing rules (§§84.601 - 84.616; former Subchapter A, new Subchapter F), some of the provisions within the rules have been reorganized and refined in order to better group information that is part of the license application, with a separate grouping for other filings submitted with the application (e.g., fingerprints, contract forms, entity documents). In addition, the references to paper forms have been eliminated and the acceptance of approved alternative formats or electronic submissions has been added throughout the licensing rules to modernize the application process and provide licensees with more options when completing the application.

The purpose of each relocated rule tracks the original purpose language used when each rule was originally adopted. Additional explanation is provided under sections where substantive changes in language have been incorporated into the proposed new rules. Any remaining changes to relocated sections consist of revisions to formatting, grammar, punctuation, spelling, section references, and other technical corrections. If no additional explanation is provided other than the main purpose of the rule, then the only changes made from the prior version of a rule being repealed to the new rule being adopted are technical and nonsubstantive in nature.

The following paragraphs outline the individual purposes of each rule. New rules will include the designation "(new rule)" after the section number, while relocated rules will be listed with their former location "(former §84.XXX)" listed after the new section number. In addition to the changes made to certain rules in response to the official comment received, the agency has made further revisions resulting from informal comments received and from internal agency review. The explanations for all changes made since the proposal are provided below the purposes for the revised sections.

Section 84.601 (former §84.101) provides definitions to be used in the licensing subchapter. In response to informal comments received regarding the proposal, subparagraph (J) concerning certain privately-held entities with complex ownership structures has been added to the definition of "principal party" under §84.601(5). This subparagraph allows the designation of three officers or similar employees with significant involvement in the entity's Chapter 348 activities upon approval by the commissioner. This clarification is intended to place in regulation the agency's practice of obtaining information from appropriate principal parties while working with the increased complexity of entity ownership structures.

Section 84.602 (former §84.102) describes the procedure for filing a new application for a motor vehicle sales finance license, including instructions regarding what forms to use, what information is necessary on the application, and what information must be filed with the application. Section 84.602 has been revised and reorganized to conform with the agency's current practice and also to streamline the application process.

Section 84.602(1)(C)(viii) has been added, clarifying that, if a parent entity is a different type of legal business entity than the applicant, the parent entity's owners and principal parties should be disclosed according to the parent's entity type.

The addition of clause (v) to §84.602(2)(A) specifically states that fingerprints must be submitted to the agency, regardless of whether an individual has previously submitted fingerprints to a different state agency, as statutory provisions require direct submission and prevent disclosure to others.

Section 84.602(2)(C)(ix) has been added and provides applicants with the option to submit a "certificate of formation" as defined in the Texas Business Organizations Code, as long as the certificate includes the required information for the applicant's business entity type.

While the proposal contained a 5% disclosure requirement for owners and principal parties under §84.602(1)(C), informal comment received was in favor of the 10% disclosure requirement, as formerly provided in §84.102. Upon reevaluation, the agency has decided to maintain the 10% requirement, which the agency believes will continue to provide the appropriate amount of disclosure.

The commenter submits the same interrelated concerns in reference to §§84.602(1)(C), 84.604, and 84.605. In general, the commenter believes that providing information beyond the parent level (e.g., remote investors) would present a problem for large motor vehicle finance companies. For each section, the commenter offers two alternative additions. With regard to the disclosure of owners and principal parties for new license applications under §84.602(1)(C), the commenter states "the detailing of every investor with a 10% or more interest in remote owners is problematic for a large organization."

As part of the commenter's suggested Alternative 1 for §84.602(1)(C), entities may file their most recent Form 10-K, as submitted to the Securities and Exchange Commission, in lieu of the information requested beyond the parent level under §84.602(1)(C). Upon the agency's review of Form 10-Ks submitted in the past (already required under §84.602(2)(C)(iii)), the Form 10-Ks reviewed did not contain most of the information necessary to fulfill the disclosure requirement.

The second sentence of the commenter's Alternative 1 provides for the allowance of other governmental filings, "if substantially equivalent in coverage and reliability to the information requested under" §84.602(1)(C). If another government filing were to include the necessary information, the agency would certainly accept it. Thus, the concept contained in the second sentence of the commenter's Alternative 1 has been added, utilizing much of the suggested wording. New clause (ix) states: "Alternative filings for all entity types. The commissioner may also accept other filings submitted to a governmental authority that the commissioner deems to have information substantially equivalent in coverage and reliability to a filing under clauses (i) - (viii) of this subparagraph." The commission declines the commenter's Alternative 2, as it would result in an ambiguous standard where licensees would be required to establish parties who are "not regularly involved in the licensee's Texas licensed operations."

The agency believes that the disclosure requirements contained in this adoption are reasonable, generally resulting in merely names and titles of parties beyond the parent level, along with a diagram of the entity's structure. It is the agency's understanding that its requirements are similar to those of other state and federal regulators in this regard. The agency must balance the information needed for franchised and independent dealers as well as for large motor vehicle finance companies. Therefore, while the commission declines to adopt the commenter's

changes to §84.602 in their entirety, the commission has added new §84.602(1)(C)(ix), providing for the option of alternative filings upon the commissioner's approval.

Section 84.603 (former §84.103) outlines the procedures for licensees to add new registered offices.

Section 84.604 (former §84.104) describes the procedures for filing an application for transfer of a motor vehicle sales finance license, including the filing requirements.

Section 84.604 has been revised, with appreciable additions to clarify the circumstances for each entity type and situation as to when a transfer will be required. Subsections (d) and (e) of former §84.104 have been combined and revised into §84.604(e) in order to provide a more cohesive explanation of the requirements when one party is seeking permission to operate under another party's license.

Regarding §84.604, the commenter states that "compliance with the requirement of filing an application for a transfer of an interest in an investor beyond its parent companies will still be problematic, because the licensee subsidiary often would not know of such transfers or have the information required." As a practical matter, the agency certainly would not require a licensee to provide transfer information of which it had no knowledge. The agency must, however, balance the transfer requirements of franchised and independent dealers and that of large motor vehicle finance companies, along with the agency's need for information regarding the beneficial ownership structure of its regulated entities.

In response to the commenter's concern, subsection (b) regarding level of ownership has been added to §84.604. Generally, this subsection puts into regulation the agency's practice in that a transfer application will not be required for a change of ownership above the grandparent level. Section 84.604(b) is intended to clarify that the grandparent level is the maximum level of ownership required for a transfer. More specifically on point with respect to the commenter is subsection (b)(1), which explains that only in certain narrow circumstances will a transfer beyond the parent level be required. Concerning corporations and limited liability companies, §84.604(b)(1) clarifies that, unless the commissioner deems a transfer necessary under subsection (a)(7), a transfer will only be required in situations resulting in a change of ownership of 51% or more of the parent entity or controlling stockholder or member. In other words, absent the two situations referenced in subsection (b)(1), a transfer application is not required for a change of ownership above the parent entity of the applicant.

As with the disclosure requirements contained in §84.602, the agency believes that the transfer requirements contained in this adoption are reasonable. Moreover, the agency believes that the current rules (even prior to this adoption) have reached a level of clarity that appears to be working well for both applicants and the agency's licensing section. The agency believes that the commenter's alternative filing requirement added to §84.602(1)(C) would not be viable in the transfer context of §84.604. Thus, while the commission declines the changes suggested by the commenter, the commission believes that the clarification contained in new subsection (b)(1) addresses the concern of the commenter.

Section 84.605 (former §84.105) describes what action the licensee must take when it changes the proportion of ownership in, or the form of, the licensed entity and lists the time frame within which the licensee must notify the commissioner.

As described under §84.602 and §84.604, the commenter offers the same concerns and alternative solutions for §84.605, if it is correct that "proposed §84.605 would require a licensee to advise the Commissioner whenever a cumulative change in ownership or remote ownership of a person other than the licensee and its immediate parent occurs . . . ." In response to the commenter, §84.605 does not require notification of a change in proportionate ownership beyond the parent level. Accordingly, since the commenter's concern does not apply to §84.605, the commission declines the changes recommended by the commenter.

Since the proposal, the notification percentage contained in §84.605(c)(1) has been increased from 5% to 10%. The agency believes that this change will best maintain consistent disclosure throughout the licensing rules. In addition, as some privately-held entities also file Form 10-Ks or 10-Qs, conforming changes have been made by deleting the words "publicly-held corporation" and replacing them with "legal entity" in §84.605(c)(1), along with related technical corrections.

Section 84.606 (former §84.107(a)) requires each applicant to supplement its application upon request by the agency.

Note that former §84.107 has been separated into two distinct rules, in order to distinguish between situations where the agency requests information to supplement an application and where the applicant has a duty to supplement its application as a result of changed circumstances. (See §84.607 which follows.)

Section 84.607 (former §84.107(b)) requires each applicant, upon discovery of new or changed information, to supplement its application within 10 days of discovery of the new or changed information.

Section 84.608 (former §84.106) describes how an application for a motor vehicle sales finance license is processed, including a description of when an application is complete as well as an explanation of what may occur if an applicant fails to complete an application. In addition, this section describes the hearings process that occurs if the applicant contests the denial of its application.

Former §84.106(g) regarding applications and notices as public records has been removed from that section and is being proposed as new §84.615. Section 84.615 is being added as a separate section to maintain consistency throughout the rule chapters governing various licensees regulated by the agency. (See discussion under §84.615.)

Section 84.609 (former §84.108) describes the procedures for relocating a licensed office, including deadlines for notification to the commissioner.

Section 84.610 (former §84.109) describes how a licensee may change its license from active to inactive status and how a licensee may activate an inactive license. This section also clarifies the procedures for a licensee to voluntarily surrender its license, resulting in cancellation, as well as when a license will expire.

Subsections (c) and (d) have been revised, and subsection (e) has been added to §84.610 in order to clarify the procedures for a licensee to voluntarily surrender its license, resulting in cancellation, as well as when a license will expire.

Since the proposal, a technical correction has been made to §84.610(d) regarding license expiration. In the first sentence, the word "on" has been replaced with the word "after" to reflect the correct expiration date of "after July 31."

Section 84.611 (former §84.110) sets out the fees for new licenses, license transfers, fingerprint processing, license amendments, annual assessments, license duplication, and costs of hearings.

Section 84.612 (former §84.111) states the implementation provisions of licensing.

Section 84.613 (former §84.112) describes the effect of criminal history information on applicants and licensees, including what information must be provided on arrests, charges, indictments, and convictions. As per Texas Occupations Code, §53.022, subsection (c) of the rule outlines the factors the agency will consider in determining whether a conviction relates to the occupation of being a motor vehicle sales finance dealer.

Section 84.614 (former §84.113) is a companion rule to §84.613. Section 84.614 describes the crimes directly related to the fitness for holding a license, as well as mitigating factors that will be considered, as per Texas Occupations Code, §53.023.

Section 84.615 (new section; former §84.106(g)) states that, upon filing with the Office of Consumer Credit Commissioner, an application for a motor vehicle sales finance license or a notice submitted by an applicant or licensee becomes a state record and public information subject to the Texas Public Information Act. Section 84.615 is being added as a separate section to maintain consistency throughout the rule chapters governing various licensees regulated by the agency. Section 84.615 is modeled after several current regulations (i.e., §§83.311, 85.212, 85.307, 88.108, and 89.311).

In response to informal comments received regarding the proposal, the following has been added as the second sentence in §84.615: "In response to a public information request, to the extent permitted by Government Code, Chapter 552 and other applicable law, the OCCC will withhold information deemed confidential by law (e.g., social security numbers, criminal history information)." This clarifying sentence places the agency's practice into regulation and is intended to provide licensees a level of comfort by listing examples of confidential information that will not be disclosed in response to a public information request.

Section 84.616 (new rule) explains the requirement for displaying licenses. Section 84.616 is being added in order to conform with current practice and to maintain consistency throughout the rule chapters governing various licensees for which license display is required. Section 84.616 is modeled after current §83.402 and §89.402.

These new sections are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513, grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

These rules affect Texas Finance Code, Chapter 348.

§84.602. Filing of New Application.

An application for issuance of a new motor vehicle sales finance license must be submitted in a format prescribed by the commissioner at the date of filing and in accordance with the commissioner's instructions. The commissioner may accept the use of prescribed alternative formats in order to accept approved electronic submissions. Appropriate fees must be filed with the application, and the application must include the following:

(1) Required application information. All questions must be answered.

(A) Application for Motor Vehicle Sales Finance License.

(i) Location. A physical street address must be listed for the applicant's proposed licensed location. A post office box or a mail box location at a private mail-receiving service generally may not be used. If the address has not yet been determined or if the application is for an inactive license, then the application must so indicate.

(ii) Responsible person. The person responsible for the day-to-day operations of the applicant's proposed offices must be named.

(iii) Signature(s). Electronic signatures will be accepted in a manner approved by the commissioner.

(I) If the applicant is a proprietor, each owner must sign.

(II) If the applicant is a partnership, each general partner must sign.

(III) If the applicant is a corporation, an authorized officer must sign.

(IV) If the applicant is a limited liability company, an authorized member or manager must sign.

(V) If the applicant is a trust or estate, the trustee or executor, as appropriate, must sign.

(VI) If the applicant is a nonprofit organization, an authorized officer must sign.

(B) List of Registered Offices for a Motor Vehicle Sales Finance License. Each additional location, other than the licensed location shown on the Application for Motor Vehicle Sales Finance License, must be listed. The applicant should provide the assumed name (DBA), physical address, telephone number, and the person responsible for day-to-day operations for each registered office. A registered office is required for any additional assumed name that the licensee uses at a single location to engage in a Texas Finance Code, Chapter 348 transaction.

(C) Disclosure of Owners and Principal Parties.

(i) Proprietorships. The applicant must disclose who owns and who is responsible for operating the business. All community property interest must also be disclosed. If the business interest is owned by a married individual as separate property, documentation establishing or confirming separate property status must be provided.

(ii) General partnerships. Each partner must be listed and the percentage of ownership stated. If a general partner is wholly or partially owned by a legal entity and not a natural person, a narrative or diagram must be included that lists the names and titles of all meeting the definition of "managerial official," as contained in Texas Business Organizations Code, §1.002, and a description of the ownership of each legal entity must be provided. General partnerships that register as limited liability partnerships should provide the same information as that required for general partnerships.

(iii) Limited partnerships. Each partner, general and limited, must be listed and the percentage of ownership stated.

(I) General partners. The applicant should provide the complete ownership, regardless of percentage owned, for all general partners. If a general partner is wholly or partially owned by a legal entity and not a natural person, a narrative or diagram must

be included that lists the names and titles of all meeting the definition of "managerial official," as contained in Texas Business Organizations Code, §1.002, and a description of the ownership of each legal entity must be provided.

(II) Limited partners. The applicant should provide a complete list of all limited partners owning 10% or more of the partnership.

(III) Limited partnerships that register as limited liability partnerships. The applicant should provide the same information as that required for limited partnerships.

(iv) Corporations. Each officer and director must be named. Each shareholder holding 10% or more of the voting stock must be named if the corporation is privately-held. If a parent corporation is the sole or part owner of the proposed business, a narrative or diagram must be included that describes each level of ownership of 10% or greater.

(v) Limited liability companies. Each "manager," "officer," and "member" owning 10% or more of the company, as those terms are defined in Texas Business Organizations Code, §1.002, and each agent owning 10% or more of the company must be listed. If a member is a legal entity and not a natural person, a narrative or diagram must be included that describes each level of ownership of 10% or greater.

(vi) Trusts or estates. Each trustee or executor, as appropriate, must be listed.

(vii) Nonprofit organizations. Each officer must be listed.

(viii) All entity types. If a parent entity is a different type of legal business entity than the applicant, the parent entity's owners and principal parties should be disclosed according to the parent's entity type.

(ix) Alternative filings for all entity types. The commissioner may also accept other filings submitted to a governmental authority that the commissioner deems to have information substantially equivalent in coverage and reliability to a filing under clauses (i) - (viii) of this subparagraph.

(D) Application Questionnaire. All applicable questions must be answered. Questions requiring a "yes" answer must be accompanied by an explanatory statement and any appropriate documentation requested.

(E) Appointment of Statutory Agent and Consent to Service. The appointment of statutory agent and consent to service must be provided by each applicant. The statutory agent is the person or entity to whom any legal notice may be delivered. The agent must be a Texas resident and list an address for legal service. If the statutory agent is a natural person, the address must be a physical residential address. If the applicant is a corporation or a limited liability company, the statutory agent should be the registered agent on file with the Texas Secretary of State. If the statutory agent is not the same as the registered agent filed with the Secretary of State, then the applicant must submit certified minutes appointing the new agent.

(F) Personal Affidavit. Each individual meeting the definition of "principal party" as defined in §84.601 of this title (relating to Definitions) must provide a personal affidavit. All requested information must be provided.

(G) Personal Questionnaire. Each individual meeting the definition of "principal party" as defined in §84.601 of this title must provide a personal questionnaire. Each question must be answered. If any question, except question 1, is answered "yes," an explanation must be provided.

(H) Employment History. Each individual meeting the definition of "principal party" as defined in §84.601 of this title must provide an employment history. Each principal party should provide a continuous 10-year history, with no gaps, accounting for time spent as a student, unemployed, or retired. The employment history must also include the individual's association with the entity applying for the license.

(I) Statement of Experience. Each applicant should provide information that relates to the applicant's prior experience in the motor vehicle sales finance business. If the applicant or its principal parties do not have significant experience in the same type of business as planned for the prospective licensee, the applicant must provide a written statement explaining the applicant's relevant business experience or education, why the commissioner should find that the applicant has the requisite experience, and how the applicant plans to obtain the necessary knowledge to operate lawfully and fairly.

(J) Business Operation Plan. An applicant must attach a brief narrative to the application explaining:

(i) an estimate of how many motor vehicles will be financed by the applicant each year;

(ii) whether the applicant will hold the retail installment sales contracts or whether the applicant will assign its retail installment sales contracts;

(iii) whether the applicant will only be accepting contracts from another entity (assignor), and, if so, list the types of entities; and

(iv) whether the collections will occur at the licensed location.

(K) Statement Regarding Previous Installment Transactions. Each applicant must submit a statement that it has or has not made or collected on any retail installment sales contract or accepted the cash payment for a motor vehicle in one or more installments from September 1, 2002, to date. This includes any contracts signed by applicant as seller that are subsequently assigned to a third party. If the applicant is purchasing another dealership and has permission to operate under an existing license, as described in §84.604 of this title (relating to Transfer of License), the statement outlined by this subparagraph is not required. If the applicant has engaged in any of the referenced activities, the applicant must provide the following information:

(i) A list of all contracts used to finance the sale of a motor vehicle in one or more installments (whether the applicant was the original seller or whether the applicant became a holder). The list should include the name of the buyer, contract date, vehicle cash price, amount of down payment, net trade-in amount, total amount financed, payment frequency (monthly, semi-monthly, bi-weekly, weekly), total number of payments, and payment amount(s).

(ii) From the list provided by the applicant, copies of ten (10) complete files. The complete file includes, but is not limited to, the buyer's order, signed retail installment sales contract, payment history, certificate of title, and other documents related to that transaction. If there are fewer than ten (10) accounts, provide a complete copy of each file.

(L) Assumed Name Certificate. For any applicant that does business under an "assumed name" as that term is defined in Texas Business & Commerce Code, §36.02(7), an Assumed Name Certificate must be filed as provided in this subparagraph.

(i) Unincorporated applicants. Unincorporated applicants using or planning to use an assumed name must file an assumed name certificate with the county clerk of the county where the proposed business is located in compliance with Texas Business & Commerce Code, §36.10, as amended. An applicant must provide a copy of the assumed name certificate that shows the filing stamp of the county clerk or, alternatively, a certified copy.

(ii) Incorporated applicants. Incorporated applicants using or planning to use an assumed name must file an assumed name certificate in compliance with Texas Business & Commerce Code, §36.11, as amended. Evidence of the filing bearing the filing stamp of the Texas Secretary of State must be submitted or, alternatively, a certified copy.

(2) Other required filings.

(A) Fingerprints.

(i) For all persons meeting the definition of "principal party" as defined in §84.601 of this title, a complete set of legible fingerprints must be provided. All fingerprints should be submitted in a format prescribed by the OCCC and approved by the Texas Department of Public Safety and the Federal Bureau of Investigation.

(ii) For limited partnerships, if the Disclosure of Owners and Principal Parties under paragraph (1)(C)(iii)(I) of this section does not produce a natural person, the applicant must provide a complete set of legible fingerprints for individuals who are associated with the general partner as principal parties.

(iii) For entities with complex ownership structures that result in the identification of individuals to be fingerprinted who do not have a substantial relationship to the proposed applicant, the applicant may submit a request to fingerprint three officers or similar employees with significant involvement in the proposed business. The request should describe the relationship and significant involvement of the individuals in the proposed business. The agency may approve the request, seek alternative appropriate individuals, or deny the request.

(iv) For individuals who have previously been licensed by the OCCC and principal parties of entities currently licensed, fingerprints are not required.

(v) For individuals who have previously submitted fingerprints to another state agency (e.g., Texas Department of Transportation), fingerprints are still required to be submitted to the OCCC, as per Texas Finance Code, §14.152. Fingerprints cannot be disclosed to others, except as authorized by Texas Government Code, §560.002, as amended.

(B) Contract forms. The applicant must provide information regarding the retail installment sales contract forms it intends to use.

(i) Custom forms. If a custom contract form is to be prepared, a preliminary draft or proof that is complete as to format and content and which indicates the number and distribution of copies to be prepared for each transaction must be submitted.

(ii) Stock forms. If an applicant purchases or plans to purchase stock forms from a supplier, the applicant must include a statement that includes the supplier's name and address and a list identifying the forms to be used, including the revision date of the form, if any.

(C) Entity documents.

(i) Partnerships. A partnership applicant must submit a complete and executed copy of the partnership agreement. This copy must be signed and dated by all partners. If the applicant is a limited partnership or a limited liability partnership, provide evidence of filing with the Texas Secretary of State.

(ii) Corporations. A corporate applicant, domestic or foreign, must provide the following documents:

(I) a complete copy of the articles of incorporation and any amendments;

(II) a copy of the relevant portions of the bylaws addressing the required number of directors and the required officer positions for the corporation;

(III) a copy of the minutes of corporate meetings that record the election of all current officers and directors as listed on the Disclosure of Owners and Principal Parties, or a certification from the secretary of the corporation identifying the current officers and directors as listed on the Disclosure of Owners and Principal Parties;

(IV) if the statutory agent is not the same as the registered agent filed with the Texas Secretary of State:

(-a-) a copy of the minutes of corporate meetings that record the election of the statutory agent; or

(-b-) a certification from the secretary of the corporation identifying the statutory agent; and

(V) a certificate of good standing from the Texas Comptroller of Public Accounts.

(iii) Publicly-held corporations. In addition to the items required for corporations, a publicly-held corporation must file the most recent Form 10-K or 10-Q for the applicant or for the parent company.

(iv) Limited liability companies. A limited liability company applicant, domestic or foreign, must provide the following documents:

(I) a complete copy of the articles of organization;

(II) a copy of the relevant portions of the operating agreement or regulations addressing responsibility for operations;

(III) a copy of the minutes of company meetings that record the election of all current officers and directors as listed on the Disclosure of Owners and Principal Parties, or a certification from the secretary of the company identifying the current officers and directors as listed on the Disclosure of Owners and Principal Parties;

(IV) if the statutory agent is not the same as the registered agent filed with the Texas Secretary of State:

(-a-) a copy of the minutes of company meetings that record the election of the statutory agent; or

(-b-) a certification from the secretary of the company identifying the statutory agent; and

(V) a certificate of good standing from the Texas Comptroller of Public Accounts.

(v) Trusts. A copy of the relevant portions of the instrument that created the trust addressing management of the trust and operations of the applicant must be filed with the application.

(vi) Estates. A copy of the instrument establishing the estate must be filed with the application.

(vii) Foreign entities. In addition to the items required by this section, a foreign entity must provide:

(I) a certificate of authority to do business in Texas, if applicable; and

(II) a statement of where records of Texas retail installment transactions will be kept. If these records will be maintained at a location outside of Texas, the applicant must acknowledge responsibility for the travel costs associated with examinations in addition to the usual assessment fee or agree to make all the records available for examination in Texas.

(viii) Nonprofit organizations. The applicant must provide a copy of the relevant portions of the instrument creating the nonprofit organization addressing management of the organization and operations of the applicant. A nonprofit applicant must also provide a copy of its filing with the Internal Revenue Service or other evidence to verify that the applicant is a nonprofit organization exempt from taxation under Internal Revenue Code of 1986, §501(c)(3).

(ix) Formation document alternative. As an alternative to the entity-specific formation document applicable to the applicant's entity type (e.g., for a corporation, articles of incorporation), an applicant may submit a "certificate of formation" as defined in Texas Business Organizations Code, §1.002, if the certificate of formation provides the entity formation information required by this section for that entity type.

(3) Late filing. An applicant who desires to retroactively file a license application may do so by complying with Texas Finance Code, §349.303, and the rules adopted under this chapter.

§84.604. Transfer of License.

(a) Definition. As used in this chapter, a "transfer of ownership" does not include a change in proportionate ownership as defined in §84.605 of this title (relating to Change in Form or Proportionate Ownership). Transfer of ownership includes the following:

(1) an existing owner of a sole proprietorship relinquishes that owner's entire interest in a license or an entirely new entity has obtained an ownership interest in a sole proprietorship license;

(2) any purchase or acquisition of control of a licensed general partnership, in which a partner relinquishes that owner's entire interest or a new general partner obtains an ownership interest;

(3) any change in ownership of a licensed limited partnership interest:

(A) in which a limited partner owning 10% or more relinquishes that owner's entire interest;

(B) in which a new limited partner obtains an ownership interest of 10% or more;

(C) in which a general partner relinquishes that owner's entire interest; or

(D) in which a new general partner obtains an ownership interest (transfer of ownership occurs regardless of the percentage of ownership exchanged of the general partner);

(4) any change in ownership of a licensed corporation:

(A) in which a new stockholder obtains 10% or more of the outstanding voting stock in a privately-held corporation;

(B) in which an existing stockholder owning 10% or more relinquishes that owner's entire interest in a privately-held corporation;

(C) any purchase or acquisition of control of 51% or more of a company which is the parent or controlling stockholder of a licensed privately-held corporation; or

(D) any stock ownership changes that result in a change of control (i.e., 51% or more) for a licensed publicly-held corporation;

(5) any change in the membership interest of a licensed limited liability company:

(A) in which a new member obtains an ownership interest of 10% or more;

(B) in which an existing member owning 10% or more relinquishes that member's entire interest; or

(C) in which a purchase or acquisition of control of 51% or more of any company which is the parent or controlling member of a licensed limited liability company occurs;

(6) any acquisition of a license by gift, devise, or descent; and

(7) any purchase or acquisition of control of a licensed entity whereby a substantial change in management or control of the business occurs, despite not fulfilling the requirements of subsection (a)(1) - (6) of this section, and the commissioner has reason to believe that proper regulation of the licensee dictates that a transfer must be processed.

(b) Level of ownership. For purposes of this section, parent entity means a direct owner of the applicant. Grandparent entity means a direct owner of the applicant's parent entity.

(1) Corporations and limited liability companies. Unless subsection (a)(4)(C) or (a)(5)(C) of this section applies resulting in a change of ownership of 51% or more of the parent entity or controlling stockholder or member, or subsection (a)(7) of this section applies, a transfer application is not required for a change of ownership above the parent entity of the applicant.

(2) All entity types. A transfer application is not required for a change of ownership above the grandparent entity of the applicant.

(c) Approval of transfer. No motor vehicle sales finance license may be sold, transferred or assigned without written approval by the commissioner.

(d) Filing requirements. An application for transfer of a motor vehicle sales finance license must be submitted in a format prescribed by the commissioner at the date of filing and in accordance with the rules and instructions. The commissioner may accept the use of prescribed alternative formats in order to accept approved electronic submissions. Appropriate fees must be filed with the transfer application, and the application for transfer must include the following:

(1) Required application information.

(A) New licensees filing transfers. The information required for new license applications under §84.602 of this title (relating to Filing of New Application) must be submitted by new licensees filing transfers. The instructions in §84.602 of this title are applicable to these filings. In addition, evidence of transfer of ownership as described in subsection (d)(2) of this section must also be submitted.

(B) Existing licensees filing transfers. If the applicant is currently licensed and filing a transfer, the applicant must provide the information that is unique to the transfer event, including the Application for Motor Vehicle Sales Finance License, Application Questionnaire, Disclosure of Owners and Principal Parties, Appointment of Statutory Agent and Consent to Service, and List of Registered Offices for a Motor Vehicle Sales Finance License. The instructions in §84.602 of this title are applicable to these filings. Other information required by §84.602 of this title need not be filed if the information on file with the OCCC is current and valid. In addition, evidence of transfer of ownership as described in subsection (d)(2) of this section must also be submitted.

(2) Evidence of transfer of ownership. Documentation evidencing the transfer of ownership must be filed with the application and should include one of the following:

(A) a copy of the asset purchase agreement when only the assets have been purchased;

(B) a copy of the stock purchase agreement or other evidence of acquisition if voting stock of a corporate licensee has been purchased or otherwise acquired;

(C) any document that transferred ownership by gift, devise, or descent, such as a probated will or a court order; or

(D) any other documentation evidencing the transfer event.

(e) Permission to operate. No business under the license shall be conducted by any transferee until the application has been received, all applicable fees have been paid, and a request for permission to operate has been approved. In order to be considered, a permission to operate must be in writing. Additionally, the transferor must grant the transferee the authority to operate under the transferor's license pending approval of the transferee's new license application. The transferor must accept full responsibility to any customer and to the OCCC for the licensed business for any acts of the transferee in connection with the operation of the business. The permission to operate must be submitted before the transferee takes control of the licensed operation. The agreement shall set a definite period of time for the transferee to operate under the transferor's license. A request for permission to operate may be denied even if it contains all of the required information. Two companies may not simultaneously operate under a single license. If the OCCC grants a permission to operate, the transferor must cease operating under the authority of the license.

(f) Application filing deadline. Applications filed in connection with transfers of ownership may be filed in advance but must be filed no later than 10 calendar days following the actual transfer. Failure to meet the application filing deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

§84.605. Change in Form or Proportionate Ownership.

(a) Organizational form. When any licensee or parent of a licensee desires to change the organizational form of its business (e.g., from proprietorship to corporation; or from corporation to limited partnership), the licensee must advise the commissioner in writing of the change within 10 calendar days by filing the appropriate transfer application documents as provided in §84.604 of this title (relating to Transfer of License). In addition, the licensee must submit a copy of the relevant portions of the organizational document for the new entity (e.g., articles of incorporation; or articles of conversion and partnership agreement) addressing the ownership and management of the new entity. Failure to meet the application filing deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

(b) Merger. A merger of a licensee is a change of ownership that results in a new or different surviving entity and requires the filing of a transfer application pursuant to §84.604 of this title. A merger of the parent entity of a licensee that leads to the creation of a new entity or results in a different surviving parent entity requires a transfer application pursuant to §84.604 of this title. Mergers or transfers of other entities with a beneficial interest beyond the parent entity level only require notification within 10 calendar days. Failure to meet the application filing deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

(c) Proportionate ownership.

(1) A change in proportionate ownership that results in the exact same owners still owning the business, and does not meet the requirements described in paragraph (2) of this subsection, does not require a transfer. Such a proportionate change in ownership does not require the filing of a transfer application, but does require notification when the cumulative ownership change to a single entity or individual amounts to 10% or greater. No later than 10 calendar days following the actual change, the licensee is required to notify the commissioner in writing of the change in proportionate ownership. This subsection does not apply to a legal entity that has filed with the OCCC the most recent Form 10-K or 10-Q filing of the licensee or of the parent entity, although a transfer application may be required under §84.604 of this title.

(2) A proportionate change in which an owner that previously held under 10% obtains an ownership interest of 10% or more, requires a transfer under §84.604 of this title.

(3) Failure to meet the notification filing deadline does not invalidate transactions unless the agency has obtained a contrary finding through the administrative process.

§84.610. License Status.

(a) Inactivation of active license. A licensee may cease operating under a motor vehicle sales finance license and choose to inactivate the license. A license may be inactivated by giving notice of the cessation of operations not less than 10 calendar days prior to the anticipated inactivation date. Registered offices will be designated as closed when a license is inactivated. Notification must be filed on the Amendment to Motor Vehicle Sales Finance License or an approved electronic submission as prescribed by the commissioner. The notice must include the new mailing address for the license, the effective date of the inactivation, and the fee for amending the license. A licensee must continue to pay the yearly renewal fees for an inactive license as outlined in §84.611 of this title (relating to Fees), or the license will expire.

(b) Activation of inactive license. A licensee may activate an inactive license by giving notice of the intended activation not less than 10 calendar days prior to the anticipated activation date. Registered offices must be listed and appropriate fees paid upon activation of a license. Notification must be filed on the Amendment to Motor Vehicle Sales Finance License or an approved electronic submission as prescribed by the commissioner. The notice must include the contemplated new address of the licensed office, the approximate date of activation, and the fee for amending the license as outlined in §84.611 of this title.

(c) Voluntary surrender of license. Subject to subsection (e) of this section, a licensee may voluntarily surrender a license by providing written notice of the cessation of operations, a request to surrender the license, and by submitting the license certificate. A voluntary surrender will result in cancellation of the license.

(d) Expiration. A license will expire after July 31 unless a fee is paid by the due date for license renewal. A licensee that pays the annual assessment fee will automatically be renewed even though a new license may not be issued.

(e) Surrendering to avoid administrative action. A licensee may not surrender a license after an administrative action has been initiated without the written agreement of the OCCC.

§84.612. Implementation Provisions of Licensing.

Effective date. The effective date of the statutory licensing requirement is September 1, 2002. After September 1, 2002, a motor vehicle

seller may not engage in any retail installment sales transaction without a motor vehicle sales finance license granted under this title. Any motor vehicle seller engaging in a motor vehicle sales finance transaction prior to September 1, 2002, must comply with Texas Finance Code, §348.401 and §348.402, and 7 TAC, Part 1, Chapter 1, Subchapter P, as those provisions were in effect. Failure to comply with previously required registration provisions is grounds for denial of an application made under §84.608 of this title (relating to Processing of Application).

§84.615. Applications and Notices as Public Records.

Once a license application or notice is filed with the OCCC, it becomes a "state record" under Texas Government Code, §441.180(11), and "public information" under Government Code, §552.002. In response to a public information request, to the extent permitted by Government Code, Chapter 552 and other applicable law, the OCCC will withhold information deemed confidential by law (e.g., social security numbers, criminal history information). Under Government Code, §§441.190, 441.191 and 552.004, the original applications and notices must be preserved as "state records" and "public information" unless destroyed with the approval of the director and librarian of the State Archives and Library Commission under Government Code, §441.187. Under Government Code, §441.191, the OCCC may not return any original documents associated with a motor vehicle sales finance license application or notice to the applicant or licensee. An individual may request copies of a state record under the authority of the Texas Public Information Act, Government Code, Chapter 552.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802046
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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Proposal publication date: February 29, 2008
For further information, please call: (512) 936-7611

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SUBCHAPTER H. RETAIL INSTALLMENT SALES CONTRACT PROVISIONS

7 TAC §§84.801 - 84.807, 84.809

The Finance Commission of Texas (commission) adopts new §§84.801 - 84.807 and 84.809, concerning Retail Installment Sales Contract Provisions, with regard to motor vehicle sales finance dealers licensed by the Office of Consumer Credit Commissioner. The new rules are adopted with changes to §84.801, and without changes to §§84.802 - 84.807 and 84.809, as published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1687). The commission received no written comments on the proposal.

These rules regarding retail installment sales contract provisions are being relocated and reorganized. The agency believes that the reorganization will benefit licensees in that these rules will be easier to find in a more logical location and order which better tracks the organization of Texas Finance Code, Chapter 348. The relocated rules are substantially similar to the rules being repealed, as found in 7 TAC, §§84.201 - 84.208 and 84.210, concerning Installment Sales Contract Provisions. The commission's adopted repeal of these sections is published elsewhere in this issue of the *Texas Register*.

The rules implement the provisions of Texas Finance Code, §341.502, which require contracts under Chapter 342 or 348, whether in English or in Spanish, to be written in plain language. Use of the model contact is optional; however, should a licensee choose not to use the model contract, or a contract comprised of model clauses, then the licensee's non-standard contract must be submitted to the agency in accordance with the provisions of new 7 TAC §84.802. Additionally, due to pending amendments, §84.209, Model Clauses, will be relocated as part of rule proposals in the near future.

The purpose of each relocated rule tracks the original purpose language used when each rule was originally adopted. Aside from one technical correction and changes to section references, the rules regarding retail installment sales contract provisions (from former Subchapter B, new Subchapter H) are merely being relocated.

The following paragraphs outline the individual purposes of each rule. Relocated rules will be listed with their former location "(former §84.XXX)" listed after the new section number. The agency has made one technical correction to §84.801 resulting from internal agency review. The explanation for this change made since the proposal is provided below the purpose for the affected section.

Section 84.801 (former §84.201) sets forth the purpose clause and discusses the benefits of plain language contracts. Section §84.801 explains the motor vehicle model contract provisions and states the intention that the provisions should constitute a complete plain language motor vehicle retail sales installment contract. Established model contract provisions encourage uniformity and provide benefits to consumers by making contracts easier to understand. A creditor is not limited to the contract provisions contained in these rules and retains flexibility to design contract forms suitable for the creditor's use. These multi-purpose contract provisions are intended for use by franchised dealers, independent dealers, holders of motor vehicle retail installment sales contracts, and individuals who sell less than five motor vehicles per year.

Since the proposal, one technical correction has been made to §84.801, by replacing the word "tile" with the word "title," resulting in the correct phrase "of this title."

Section 84.802 (former §84.202) provides the procedures for licensees to submit non-standard contract submissions to the agency.

Section 84.803 (former §84.203) explains the relationship of federal law to the state requirements. The section describes how any conflicts or inconsistencies shall be resolved.

Section 84.804 (former §84.205) outlines the disclosure and contract provisions required by the Texas Finance Code.

Section 84.805 (former §84.206) outlines the disclosures required by Finance Commission rule.

Section 84.806 (former §84.207) details the required format, typeface, and font for model plain language motor vehicle retail installment sales contracts. The rule attempts to establish minimum allowable type sizes and typefaces. The rule also permits flexibility for labeling contracts through the use of titles and headings. The creditor has considerable flexibility in the formatting and arrangement of the information contained in the

model clauses. The requirements are necessary to ensure that the contract will be easy for consumers to read and understand.

Section 84.807 (former §84.208) identifies the types of provisions that are typically included in a Chapter 348 motor vehicle retail installment sales contract. Creditors may determine which provisions are most applicable for their transactions. Creditors may omit provisions that are not applicable to a particular transaction. If a creditor desires to assess certain charges or exercise certain rights under the provisions, the creditor must contract for that fee or right. For example, if a creditor desires to assess a late charge, the creditor must provide for a late charge provision. Also, if a creditor desires to purchase collateral protection insurance because the buyer failed to keep required insurance, the creditor must include a contractual provision permitting the creditor to purchase the required insurance.

Section 84.809 (former §84.210) outlines permissible changes that can be made to a contract and still comply with the model provisions. This section provides licensees with flexibility in using the model clauses. Licensees may use additional documents in connection with the model documents contained in this rule. If a licensee incorporates additional documents, these additions may need to be submitted as non-standard forms if they do not employ the model clauses. Certain documents like the odometer statement, buyer's order, title application documents, notices to co-signer, buyer's guides, and similar documents do not need to be submitted as non-standard forms. Additional documents such as arbitration agreements, conditional delivery agreements, and guarantor agreements will need to be submitted for a readability review in accordance with new 7 TAC §84.802.

These new sections are adopted under Texas Finance Code, §11.304, which authorizes the Finance Commission to adopt rules to enforce Title 4 of the Texas Finance Code. Additionally, Texas Finance Code, §348.513 grants the Finance Commission the authority to adopt rules to enforce the motor vehicle installment sales chapter.

These rules affect Texas Finance Code, Chapter 348.

§84.801. Purpose.

(a) The purpose of this subchapter is to provide model provisions and a model plain language contract in English for Texas Finance Code, Chapter 348 motor vehicle installment sales contract provisions. The establishment of model provisions for these transactions will encourage the use of simplified wording that will ultimately benefit consumers by making these contracts easier to understand. Use of the "plain language" model contract by a seller is not mandatory. The seller, however, may not use a contract other than a model contract unless the seller has submitted the contract to the commissioner in compliance with §84.802 of this title (relating to Non-Standard Contract Filing Procedures). The commissioner shall issue an order disapproving the contract if the commissioner determines the contract does not comply with this section or rules adopted under this section. A seller may not claim the commissioner's failure to disapprove a contract constitutes approval.

(b) These provisions are intended to constitute a complete plain language motor vehicle installment sales contract; however, a seller is not limited to the contract provisions contained in these rules.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 18, 2008.

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Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
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Proposal publication date: February 29, 2008
For further information, please call: (512) 936-7611

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TITLE 13. CULTURAL RESOURCES

PART 1. TEXAS STATE LIBRARY AND ARCHIVES COMMISSION

CHAPTER 3. STATE PUBLICATIONS DEPOSITORY PROGRAM

13 TAC §§3.1, 3.2, 3.4, 3.6

The Texas State Library and Archives Commission adopts without changes amendments to 13 TAC §§3.1, 3.2, 3.4 and 3.6 regarding the State Publications Depository Program, posted in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1480). The revisions update definitions of terms; clarify when new versions of a document must be deposited through the program; update procedures the Texas State Library and Archives Commission and state agencies follow to enable their Internet-based publications to be searched and archived under the new TRAIL technology; and exempt certain state publications from deposit.

No comments were received during the comment period.

The amendments are adopted under Government Code §441.102 which authorizes the commission to adopt rules "for the distribution of state publications to depository libraries and for the retention of those publications," and to "establish and maintain a system, named the 'Texas Records and Information Locator,' or 'TRAIL,' to allow electronic access, including access through the Internet, at the Texas State Library and other depository libraries to state publications that have been made available to the public through the Internet by or on behalf of a state agency."

The amended section affects Government Code §§441.101 - 441.105.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

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TITLE 16. ECONOMIC REGULATION

PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

SUBCHAPTER H. ELECTRICAL PLANNING

DIVISION 2. ENERGY EFFICIENCY AND CUSTOMER-OWNED RESOURCES

The Public Utility Commission of Texas (commission) adopts the repeal of §25.181, concerning Energy Efficiency Goal and §25.184, concerning Energy Efficiency Implementation Project and adopts new §25.181, concerning Energy Efficiency Goal. New §25.181 is adopted with changes to the proposed text as published in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7833). The repeal of §25.181 and §25.184 are adopted without changes to the proposal and will not be republished. New §25.181 as adopted raises electric utilities' energy efficiency goals from ten percent of growth in demand to fifteen percent of growth in demand by January 2009, and twenty percent of growth in demand by January 2010, and also establishes an energy goal. The new section also establishes an energy goal and updates the cost-effectiveness standard by adjusting the avoided cost of energy; provides the utilities the flexibility to set incentives for energy-efficiency programs, subject to the cost-effectiveness standards in the rule; and establishes a cost-recovery factor to compensate a utility for reasonable expenditures on energy efficiency and a performance bonus for exceeding its goal. The repeal of §25.184 removes the energy efficiency program templates from the rule, so that they may more easily be modified to reflect changes in circumstances relating to energy efficiency. Many of the changes in the energy-efficiency program are a direct response to House Bill 3693, enacted during the 80th session of the Texas Legislature. Project Number 33487 is assigned to this proceeding. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e).

In addition to comments on the proposed rule language, the commission invited comments on the following questions:

1. Should §25.181 specify a third party to advertise or act as an informational clearinghouse for the utilities' energy efficiency programs? If so, who should that third party be and how should this function be funded?

2. Should the calculation of avoided costs include avoided transmission costs?

Written comments were timely filed by December 4, 2007. The commission received comments on the proposed repeals and new section from Steering Committee of Cities Served by ONCOR (Cities), Governmental Aggregation Project (GAP), Office of Public Utility Counsel (OPC), Sierra Club, TXU Energy, Electric Utility Marketing Managers of Texas (EUMMOT), CenterPoint Energy Houston Electric, LLC (CenterPoint), El Paso Electric Company (EPE), Xcel Energy (Xcel), Reliant Energy (Reliant), Texas Ratepayers' Organization to Save Energy and Texas Legal Services Center (Texas ROSE and TLSC), Public Citizen (filing separate comments), a coalition led by Public Citizen, Environmental Defense, and Sustainable Energy and Economic Development Coalition (SEED Coalition), Air Liquide Large Industries' (Air Liquide), Appliance Recycling Centers of America, Inc. (ARCA), Free Lighting Corporation (FLC), Good Company Associates, Inc. (Good Company), Alliance for Retail Markets (ARM), Climate Master, Inc., Center for the Commercialization of Electric Technologies (CCET), EnerNOC, Efficiency Texas (Efficiency Texas), Nucor Steel (Nucor), Texas Industrial Energy Consumers (TIEC), Texas Combined Heat and Power Initiative (TXCHPI), CAF Energy Inc., and UTC Power. The organizations and individuals filing joint comments with Public Citizen were SEED, Environment Texas, Texas Impact, Texas Interfaith Power and Light, Citizens' League for Environmental Action Now (CLEAN), Clean Air Institute, Citizens Organizing for Resources and Environment (CORE), Environmental Integrity Project, Dr. Mary Landon Darden, Southwest Workers Union, Austin Physicians for Social Responsibility, Galveston Houston Association for Smog Prevention (GHASP), Solar Austin, and People Organized in Defense of Earth and her Resources (PODER). All parties commenting on the repeal of §25.181 and §25.184, and adoption of new §25.181, supported the adoption of the new rule. However, the parties provided comments, as articulated below, suggesting alternate language to be included in the adopted rule.

A public hearing on this rulemaking was held at commission offices on December 10, 2007, at 10:00 a.m. Representatives from Public Citizen, Texas ROSE, Good Company, SEED, TXU Energy, Reliant, ARM, GAP, TXCHPI, Environmental Defense, R and L Energy Technology and OPC provided comments at the hearing. To the extent that these comments differ from the submitted written comments, such comments are summarized herein.

Question 1: Should §25.181 specify a third party to advertise or act as an informational clearinghouse for the utilities' energy efficiency programs? If so, who should that third party be and how should this function be funded?

The following commenters did not support a third party functioning as a clearinghouse: Cities, TXU Energy, EUMMOT, CenterPoint, EPE, Reliant, Public Citizen Environmental Defense, SEED Coalition, FLC, Good Company, ARM, and Efficiency Texas.

The following commenters supported a third party functioning as a clearinghouse: GAP, OPC, and Texas ROSE and TLSC. The Sierra Club filed a position allowing for the possibility that a third party would be specified to function as a clearinghouse.

Cities stated they saw no apparent benefit associated with requiring a third party to serve as a clearinghouse, and that the creation of such a position would likely increase the programs' administrative costs. Reliant agreed. EPE agreed and noted that it is not clear how the clearinghouse would function to provide usable information reflecting statewide areas. Good Company agreed, and also stated that the investments in marketing made by ESCOs (energy service companies)--and in the future, REPs (retail electric providers)--would help to ensure their dedication to the program. Efficiency Texas also agreed, and noted that HB 3693 required a study and analysis of issues and options related to the energy efficiency programs, and directed that REPs in Electric Reliability Council of Texas (ERCOT) and utilities outside ERCOT provide customers with energy efficiency educational materials.

TXU Energy stated there would be inherent challenges to a third party being designated to advertise or act as informational clearinghouse for utilities' energy efficiency programs. TXU Energy stated that one challenge would be the source of funds for payment, and it recommended that payment come from the utility

administration fee. TXU Energy also noted that a "call for action" with third party advertisements would pose an additional challenge, as the REP or the Energy Efficiency Service Provider (EESP) could be placed in the awkward position of being required to continue to offer programs advertised by someone else or face repercussions for discontinuing a program. TXU Energy questioned who the customer would call to get more information regarding programs' availability. TXU Energy stated that the transmission and distribution utilities should not be placed in a role of direct customer contact, and TXU Energy suggested that the commission consider conducting a workshop to identify opportunities and challenges associated with using a third party as a clearinghouse. TXU Energy noted that if, in spite of the challenges, the commission determines to use a third party that it may be more appropriate for the commission to select a third party through an RFP process.

EUMMOT believed that it would be difficult to operate an effective advertising campaign or clearinghouse for the utility programs. EUMMOT noted that the EESPs compete with one another, and it would be difficult for the administrator to fully monitor services being offered. CenterPoint stated it does not believe that a third party would be needed, because the transmission and distribution utilities have had great success in advertising and promoting energy efficiency both on their own and through third parties chosen by the transmission and distribution utilities.

The SEED Coalition stated that it does not believe that the Texas statutory framework leaves much operating space for a third party administrator for the energy efficiency programs. It noted that the responsibility and resources for advertising should not be separated from the reward/risk position of the utility, and that a regulated utility should retain sufficient motivation and flexibility of action to earn a performance bonus and avoid an administrative penalty. It also stated that such a clearinghouse function to make information accessible to the public could be developed with information already required to be reported. In addition, it noted that REPs should be required to use their direct customer access to periodically provide notice of availability of all energy efficiency programs within a utility service territory. The EEIP (Energy Efficiency Implementation Project) information requirement would be even more important if an Energy Efficiency Cost Recovery Factor would appear on customers' bills.

FLC commented that if a project sponsor invests money itself for advertising, it is much more likely to maintain control over the costs. ARM stated that the use of a third party is not necessary. ARM noted that PURA §39.905 states that retail customers' access to the energy efficiency programs would be through the market, and subsection (a)(1) - (3) does not contemplate that they access those programs directly from the electric utilities.

GAP, on the other hand, recommended that the commission consider being the third party to develop, implement and administer a proactive outreach program focused on utilities' energy efficiency programs. GAP stated that HB 3693 envisioned an increase in the mix of parties in energy efficiency programs, and each party may choose to advertise and market its programs. GAP noted that a clearinghouse should provide access to educational materials to enable the consumer to discriminate among the programs and choose from various program sponsors and service providers. GAP stated that to participate in programs, the consumer must have timely information and tools that save them time and money and that the Texas Electric Choice education program has performed this function to guide consumers in choosing their electricity provider. GAP requested that if the commission was not able to perform a clearinghouse function at this time that the commission seek funds in the next legislative session to carry out this vital role.

OPC recommended that the commission appoint a third party to act as a statewide clearinghouse and resource center for consumers with online computer access to the information. OPC stated that the advertising of the energy efficiency program should be the responsibility of the commission, the utilities and market participants. OPC noted that a statewide resource center could be funded by a portion of the energy efficiency budget from each utility. OPC stated that the advertising funding should be considered cost of doing business and recovered through prices and general rates.

Texas ROSE and TLSC stated that the rule should direct that a neutral third party act as an information clearinghouse for consumer information on energy efficiency programs. They noted that today only EESPs have contact with residential consumers. They further noted that REPs to date are not engaged in energy efficiency discussions with their customers, that a third party contact would comply with the competitive energy service rules and be of service to residential and low-income customers, and a third party provider would be the solution to the information problem. In addition, they stated that the commission should adopt a third party even if only on temporary five-year basis, noting that a temporary program could make consumers more aware of energy savings potential and more engaged in making wise energy choices.

The Sierra Club recommended that the commission should explore the possibility and cost-effectiveness of hiring a third party to advertise and promote energy efficiency programs. The Sierra Club noted several options, such as having the commission serve as the clearinghouse and advertiser; having the utilities maintain their own clearinghouse and promote their own energy efficiency products; or, selecting a third party through an RFP process.

Commission response

The commission appreciates the thoughtful comments on the question that it posed. A number of the commenters raised valid concerns with the use of a third party to advertise or be an information clearinghouse. This issue is also one that the legislature included in the scope of the report that the commission is directed to submit prior to the beginning of the next legislative session. There may be a value in continuing to explore this issue, particularly in connection with the higher energy-efficiency goals that the legislature adopted in 2007. In view of the concerns that have been raised with respect to this matter, the commission is not taking any action to amend the rule to require the use of a third party.

Question 2: Should the calculation of avoided costs include avoided transmission costs?

OPC, Cities, and Reliant opposed inclusion of avoided transmission costs, whereas the following commenters supported it: GAP, Sierra Club, TXU, EUMMOT, CenterPoint, Texas ROSE and TLSC, Public Citizen, SEED, Good Company, ARM, Efficiency Texas, Nucor and TXCHPI.

OPC recommended that the calculation of avoided costs not include the avoided transmission costs. Cities agreed, noting that it would be difficult to ascertain the impact of individual energy efficiency programs on transmission investments, and that the existing incentives for energy efficiency are generous.

Reliant stated that it had concerns about inflating the avoided costs through the addition of a generic transmission avoided cost amount. Reliant suggested that the avoided capacity cost of generation be based on the capital cost of a new gas turbine, the avoided cost of distribution be based on distribution avoided cost data filed by the utilities, and that the avoided cost of generation capacity be $80/kilowatt (k/W) per year.

GAP, however, commented that the avoided cost for residential and commercial customers is the retail costs avoided by the customer. GAP also suggested that the avoided cost (retail cost) be calculated by each utility service area. GAP suggested estimating commercial rates by escalating the MCPE averages by use of adders that would account for the retailers' additional costs and transmission and distribution rates by utility service areas. The Sierra Club agreed and suggested a more flexible calculation of avoided costs for certain types of programs so that they could be competitive and become more commonplace.

TXU Energy commented that the calculation of avoided costs should include the avoided transmission costs so the calculation represents true market expense and does not place demand-side options at a disadvantage to supply-side options.

EUMMOT commented that it had no objection to the avoided transmission costs being included in the calculation of avoided costs, and noted that investments in transmission infrastructure that could potentially be avoided or deferred by energy efficiency investments tend to very location-specific and can vary over time, so the calculation of such costs would involve extensive analyses and prove extremely burdensome. EUMMOT suggested that if the avoided transmission costs would be included in the calculation that a simple formula or "proxy value" be adopted to avoid a complicated and controversial study. CenterPoint agreed with EUMMOT, but noted that transmission costs are driven by considerations beyond increases in demand or energy flow. In addition, it stated that the calculation of avoided transmission costs would be difficult without simplifying assumptions, and that the dollar magnitude of avoided transmission costs should be small in comparison to the properly-calculated avoided generation and energy costs. On balance, CenterPoint recommended against the inclusion of transmission in estimating avoided costs.

Texas ROSE and TLSC stated that including transmission and distribution costs in the incentive calculations would be a fair and reasonable strategy for achieving accelerated acceptance of the highest efficiency equipment, noting that choosing an efficient measure should carry a higher level of compensation than the standard program choice. Public Citizen, Environmental Defense, and SEED Coalition agreed and stated that the goal of the energy efficiency legislation is to increase deployment of energy efficiency. They suggested that to ensure that adequate investments are encouraged in energy efficiency, the cost effectiveness should reflect avoided costs of additional transmission and distribution and that a reasonable way to do this would be for residential and commercial customers to use the retail costs avoided by the customer. Good Company agreed, commenting that demand reduction can substantially reduce the need for new transmission and distribution infrastructure.

ARM stated they do not oppose the inclusion of avoided transmission and distribution costs as long as the calculation of those avoided costs is reasonable and does not over-inflate incentive payments. ARM agreed that value of an energy efficiency program could include avoided transmission and distribution capacity costs for the same reasons it could encompass an avoidance of generation capacity and energy costs. ARM proposed that one possible way to calculate avoided transmission and distribution costs would be to divide the total transmission costs incurred by transmission and distribution utilities in ERCOT for a specific year and divide that amount by the number of kW for the same year. ARM noted that the calculation is similar to the ERCOT postage stamp rate for wholesale transmission service, and the calculation could be updated every two years to be consistent with the two-year adjustment required for generation capacity and energy avoided costs under proposed subsection (d)(2). Nucor suggested a similar approach and encouraged the commission to take avoided transmission costs into account in the presents rule or at a minimum study the subject further for possible future inclusion in the energy efficiency rule.

Efficiency Texas believed that the calculation of avoided costs should include avoided transmission costs. Efficiency Texas stated that it is well known that by increasing our energy efficiency we lessen the need for new power plants. Efficiency Texas noted that this is today reflected in the avoided costs calculation of the present energy efficiency rule, as well as the proposed rule, which established the baseline for energy efficiency incentives. Efficiency Texas stated that excluding transmission costs would underestimate and undervalue energy efficiency. Efficiency Texas proposed including avoided investment in transmission and distribution that can be credited to energy efficiency in the calculation of avoided costs. Efficiency Texas noted that the utilities are given flexibility under the proposed rule to provide incentives at an amount they deem appropriate to achieve cost-effective energy and demand savings, but these incentives cannot exceed the avoided cost. Efficiency Texas noted that increasing the avoided cost calculation does not automatically lead to raising the costs of the program, but it does allow the utilities to pay customers enough to create increased program participation and provides additional flexibility to meet or exceed the energy efficiency goals.

TXCHPI supported the inclusion of avoided transmission costs in the calculation of avoided costs. TXCHPI stated that all CHP (combined heat or heating and power) and many other energy efficiency measures reduce the need for transmission facilities and should receive credit for the value of the savings. TXCHPI noted that, in addition, line losses should be considered in the avoided cost calculation.

Commission response

The energy efficiency-programs have largely been successful without including transmission or distribution costs in the avoided cost calculation. Even under the current version of the rule that has caps on the incentives that utilities may provide that, for most rate classes, were well below the avoided cost in the rule, utilities have generally been able to meet their goals. Other changes that are being adopted in this rule would increase the energy avoided cost to reflect current market conditions and give the utilities latitude to set the incentives at any level below the avoided cost. Both of these changes could result in higher incentives, if the utilities conclude that they are appropriate. For the present, the commission does not believe that including transmission and distribution costs in the avoided cost calculation is necessary to meet the statutory goals, or that failing to include them will work to the disadvantage of any otherwise cost-effective energy-efficiency measures. This is an area that may warrant further investigation, particularly if utilities have difficulties meeting the new goals prescribed by the legislature or that may be implemented in the future.

Under the current statute, utility energy efficiency budgets are subject to cost caps that will limit what the utilities may spend for energy efficiency. The commission believes that these caps will be the limiting factor for utilities in promoting energy efficiency programs in the near future. Thus, a higher avoided cost that included transmission and distribution avoided costs would probably not have any impact on the level of utility energy efficiency budgets. In addition, because of the opportunity for utilities to earn bonuses for cost-effectively meeting the statutory goal, utilities will have an incentive to select the most cost-effective programs. Thus, a higher avoided cost that included transmission and distribution avoided costs would probably not have a significant impact on the selection of utility energy efficiency programs. Moreover, ERCOT is structured as an energy-only market so that the cost of energy and any implied cost of capacity are included in the wholesale and retail prices of electricity. The structure of the cost cap in the rule is a wholesale energy price and a calculated generation capacity cost. This structure may over-state the cost of wholesale electricity, and it is probably a rough proxy for wholesale energy costs plus avoided transmission and distribution costs. A study could be undertaken to develop a better estimate of avoided production, transmission, and distribution costs, but the commission concludes that adopting the rule changes that are required to implement the 2007 legislative changes quickly is more important at this point than conducting a study to develop a better estimate of avoided cost. The cost differences among service areas are relatively small, and the commission concludes that establishing avoided costs by service area would provide little benefit.

§25.181(a): Purpose

Cities proposed modifying §25.181(a)(1) - (3) to specify that electric utilities must administer cost-effective energy efficiency incentive programs that provide net economic benefits to retail consumers, including cost-effective energy efficiency alternatives that allow each customer to reduce energy consumption, peak demand, and net energy cost. Cities and the Sierra Club proposed modifying subsection (a)(1) to specify that energy efficiency programs are designed to obtain energy savings or peak demand reductions beyond savings that would otherwise be achieved in the marketplace.

TXU Energy proposed modifying subsection (a) to include the addition of a new purpose, to specify that each electric utility in the ERCOT region use its best efforts to encourage and facilitate the involvement of the region's retail electric providers in the delivery of efficiency programs and demand response programs.

Commission response

The commission concludes that it is not necessary to include "net economic benefits" or "net energy costs" in subsection (a), as these concepts are addressed in subsection (d). In addition, the commission concludes that adding a provision specifying that energy efficiency programs are "designed" to obtain energy savings or peak demand reductions beyond what is available in the marketplace is not necessary, since the rule being adopted clearly reflects this purpose. Finally, the commission does not adopt an additional provision regarding "best efforts" to encourage and facilitate REP involvement, since the rule adequately addresses REP involvement in subsection (r).

§25.181(c): Definitions

CenterPoint suggested that the definition of "affiliate" in proposed rule §25.181(c)(1) should simply incorporate the statutory definitions of an "affiliate" into the new rule by reference.

Commission response

The commission does not adopt this suggestion. The definition in the rule specifically addresses energy efficiency service providers (EESPs). Using the statutory definition would require translating a definition relating to utilities to business arrangements involving REPs and would likely reduce the clarity of the definition, as applied to EESPs.

CenterPoint, Xcel, TIEC and ARM suggested clarification of the definition of "commercial customer" in proposed subsection (c)(2). CenterPoint recommended that, since the application of the rule and certain tariff applications will turn on this definition, the proposed definition should include "a governmental entity, including an education institution, a non-profit corporation, a hospital, or an institution of higher education taking service at a metered point of delivery at transmission voltage under an electric utility's tariff."

TIEC proposed that the definition of "commercial customer" would be "a non-residential, non-industrial customer taking service at a metered point of delivery at a distribution voltage under an electric utility's tariff during the prior calendar year and a non-profit customer or government entity, including an educational institution. For purposes of this section, each metered point of delivery shall be considered a separate customer." In addition, TIEC suggested that a definition of "industrial customer" be added.

Xcel stated that the rule should clarify whether all non-profit customers and government entities are considered commercial customers and, thus, included in the demand and energy goals (and charged the energy efficiency rider), or whether these customers have the option of participating. Xcel noted that, to the extent these customers have the option of participating, the rule should clarify the terms of participation, such as the date the customer must "opt in" and whether or not the customer may change its election.

Commission response

The commission concludes that the definition of commercial customer should include those activities that are not regarded as industrial, such as government and non-profit organizations. The definition should also be practical, to facilitate determinations of eligibility, applications of rates and riders for energy efficiency, and determining load and load growth. The clarification suggested by CenterPoint and other parties is consistent with this approach, as is the provision suggested by TIEC that each metered point of delivery is to be treated as a separate customer. The other changes are not consistent with this approach and, accordingly, are not adopted.

TXCHPI suggested that a new definition be added for "combined heat and power" to be defined as "the simultaneous generation of electrical energy and useful heat from the same fuel source."

Commission response

The commission believes that the concept of "combined heat and power" is sufficiently well understood that a definition is not necessary for the rule.

Cities proposed modifying the definition of "deemed savings" in subsection (c)(5) to specify the use of deemed savings only in instances in which it is demonstrated that there are not cost-effective means to determine energy and peak demand savings determined through standard measurement and verification activities.

Commission response

The commission believes that experience has shown that rigorously developed deemed savings calculations are an efficient and effective way to assess the impact of energy-efficiency measures for mass-market customers. Establishing a preference for the use of measurement and verification protocols would probably make it more expensive to deploy energy-efficiency programs to residential and small commercial customers. With higher energy-efficiency goals and new limitations on the participation of industrial customers in the programs, it is more important than ever to be able to continue to develop and use effective programs for residential and small commercial customers. Accordingly, this suggestion is not adopted.

Sierra Club, Public Citizen, Environmental Defense and SEED suggested that a new definition be added for "demand response." They stated that "demand response" should include reliability programs administered by the independent system operator, and incentives should not be paid for "market signal" time-of-use rate programs offered by the retail electric providers. They stated that they would prefer that utility-based demand response programs employ long-term contracts for an aggregate response consistent with the average life of efficiency measures, and encourage demand reductions over deferral of consumption. The Sierra Club stated that the definition for "demand response" could simply refer back to "load management."

Commission response

The commission concludes that an additional definition for "demand response" is not necessary. Substantive provisions address the role of demand response and load management elsewhere in the rule.

Texas ROSE and TLSC noted that the exclusion of industrial customers from participation in energy efficiency programs is a fundamental change. Texas ROSE and TLSC stated they are unaware of any precedent for exempting a class of customers is from making a contribution to the energy efficiency goal of a utility system. Texas ROSE and TLSC stated that, because industrial customers are excluded from the program, residential and low-income consumers and commercial customers are responsible for achieving the goals and paying for the program costs. Texas ROSE and TLSC stated that the costs include higher rates for underwriting the program and personal investments on the part of residential and commercial customers who choose to be more energy efficient.

Public Citizen, Environmental Defense and SEED stated that the removal of industrial customers from the energy efficiency baseline has the unintended consequence of reducing the state targets and resource calculations. They believed that realizing the state's energy efficiency potential will require the participation of industrial customers and, recognizing that a few industrial customers successfully lobbied to be excluded from participation in the state's efficiency goals and programs, they stated that limiting this exclusion to those customers taking service at transmission voltage for industrial processes is an appropriate resolution. They supported the eligibility of non-profit and governmental entities for the full range of energy efficiency programs.

OPC acknowledged the industrial customers are to be treated differently and noted concern with the treatment of the industrial class in determining how costs should be allocated. OPC recommended the rule be clarified to ensure that the allocation of the energy efficiency incentive program costs consider the industrial class's participation.

TIEC stated that the expenditures made by industrial customers are more focused and tailored to meet their specific needs, and many industrial customers need a different level of energy efficiency measures than the limited programs offered by the utilities. TIEC recommended that the commission properly define "industrial customer" in this rule to develop a rule that fairly implements HB 3693. TIEC stated that the rule as proposed contains a significant flaw, in that it fails to exclude all industrial customers from participating in and funding the energy efficiency programs. TIEC stated the proposed definition of "commercial customer" applies to all customers that take service at distribution voltage, including many industrial customers. TIEC noted this broad definition ignores the legislative directive that only residential and commercial customers are required to participate in these mandated programs. TIEC stated that many non-industrial customers take service at transmission voltage and many industrial customers take service at distribution voltage. TIEC noted that the proposed rule recognizes this distinction by creating an exception for non-profit and governmental entities in the proposed definition of "commercial customer." TIEC stated that many of these non-industrial customers take service at transmission level. TIEC noted conversely, industrial customers, typically identified by SIC or other codes as manufacturers or producers, can and do take service at distribution voltage.

TIEC submitted that a preferable way to distinguish between industrial and commercial customers is on the basis of business processes. TIEC noted there are many ways in which to accomplish this (through reference to SIC or other code), but one accepted method to distinguish industrial customers is the State's sales tax exemption process. TIEC noted that the Tax Code exempts certain industrial manufacturing and processing activities from sales tax on electricity. TIEC recommended relying on Tax Code exemptions to define industrial customers.

Nucor stated that the rule should emphasize that energy efficiency is encouraged among all customer classes. In Nucor's view, the legislature specifically and purposely targeted the residential and commercial customer classes in PURA §39.905, but it explicitly did not intend to exclude industrial customers from the commission's energy efficiency efforts. Nucor stated that the legislature expressly provided that all customer classes must have a choice of and access to energy efficiency alternatives, even though it set specific goals only for residential and commercial customers. Nucor believed the commission could revise its proposed rule to make it more inclusive, without changing its primary focus.

Air Liquide proposed modifying the definition of "eligible customers" in subsection (c)(7) so that industrial customers could be included as "eligible customers" to the extent that they meet the criteria for participation in load management standard offer programs developed for industrial customers and implemented prior to May 1, 2007, or the criteria for programs provided for under subsection (t) of this section. Air Liquide was concerned that CenterPoint, and possibly other utilities, have taken a position that unnecessarily penalizes industrial customers by eliminating energy efficiency programs for industrial customers. These are programs that the utilities budgeted for, that industrial customers paid into, and that customers have relied upon.

Commission response

As the commission noted above, important objectives in defining customer classes that will be eligible to participate in the energy efficiency programs are whether the definition is practical and it facilitates determinations of eligibility, applications

of rates and riders for energy efficiency, and determining load and load growth. The commission believes that the criteria suggested by TIEC for identifying industrial customers do not meet these objectives. Relying primarily on voltage level, however, is practical and provides a simple means of identifying industrial customers for the various purposes that they need to be identified. In particular, the transmission customers are a separate class of customers with respect to rates for the ERCOT utilities. The commission does not agree with Nucor's view that the rule should continue to encourage the participation of industrial customers in the programs set out in this rule. The clear import of the amendments in HB 3693 was to curtail industrial programs, except to the extent that they are grandfathered under PURA §39.905(a)(6).

The commission agrees with Air Liquide's recommendation for a limited grandfathering of industrial customers. As Air Liquide pointed out, the industrial customers are likely to continue paying rates that include the cost of industrial programs during 2008, so their ability to participate in the programs should not be abruptly eliminated. This provision is included in subsection (t).

Cities and Reliant proposed modifying the definition of "energy efficiency" in subsection (c)(9) to remove "with the same or higher level of end use service." Cities also proposed deletion of "and that do not materially degrade existing levels of comfort, convenience, and productivity." Reliant stated that the definition for energy efficiency simply creates confusion and invites debate and the phrase should be deleted. Reliant raised concerns with existing rule language that would have energy efficiency "maintain or improve existing levels of comfort, convenience and productivity," specifically stating that whether something provides for a higher or lower level of service may be in the eye of the beholder.

Texas ROSE and TLSC stated that HB 3693 defines energy efficiency as using less energy to provide the same or improved level of service to the energy consumer in an economically efficient way. The term energy efficiency as used here includes using less energy at any time, including at times of peak demand through demand response and peak shaving efforts. Texas ROSE and TLSC stated HB 3693 amends the language in PURA describing programs to be offered from energy "saving" programs to energy "efficiency" programs. Texas ROSE and TLSC noted that there is a difference, and the proposed rule, as published, would have amended several provisions to allow utilities to implement programs that save only demand. Texas ROSE and TLSC commented that energy efficiency applies to programs that promote changes that reduce electricity use without any degradation of comfort level, but the new definition adds language that permits a degradation of comfort level, convenience and productivity. HB 3693 allows such degradation of service to be eligible for incentives, but these impacts should be directly associated with load control and load management and that the rule should continue to distinguish between programs that do and do not impact service and comfort levels.

Commission response

"Energy efficiency" has been understood to involve using less energy to provide the same benefits that electric service brings to customers, such as heat, light, cooling, and the power for appliances that customers regard as necessities or important conveniences. The commission definition in the proposed rule would have modified the prior definition by referring to reductions in energy or demand that do not "materially degrade" a customer's comfort level, convenience or productivity. This change would provide latitude to include programs such as air conditioner cycling programs as eligible energy-efficiency programs. These programs may result in changes in room temperature, but the expectation is that most customers would not regard them as resulting in a material degradation in comfort levels, and the programs have the potential to provide significant demand savings. The commission believes that this concept should remain a part of the rule, for this reason.

In addition, the commission does not believe that different standards for customer impact should be adopted for programs that are primarily demand reduction programs. The simple message for all energy-efficiency programs should be that customers have the potential to benefit from the programs, and existing light, heat, cooling, information, and other benefits will not be materially affected.

Cities proposed modifying the definition of "energy efficiency measures" in subsection (c)(9) to remove the last portion "so long as the customer need satisfied by the appliance is still met," and seeks to include language expanding the measures that can be included to say that such measures "may include but are not limited to thermal energy storage and removal of an inefficient appliance." ARCA supported the Cities' proposed definition of "energy efficiency measures" as it provides the clarification necessary to fully allow wider adoption of cost-effective energy efficiency programs such as ARCA's appliance recycling programs.

CAF provided professional engineering data supporting the new proposed definition of energy "efficiency measures." CAF stated that restrictions placed on certain technologies in the prior version of §25.181 should be repealed.

Commission response

The commission is not adopting the deletion proposed by Cities. Energy efficiency does not include eliminating an electricity-driven function, but consists of providing the same function with less demand or energy. The commission concludes that an appliance recycling program would not be disqualified under the definition in the proposed rule and that there is, therefore, no need to adopt this suggested change. The commission is adopting the proposed definition, as suggested by CAF.

Texas ROSE and TLSC stated that "practices" listed in proposed subsection (c)(10) are not eligible for incentives under the current rules and should not be eligible for incentives in the future, since the incentives paid for energy efficiency should be those that will persist over time. They commented that when materials and equipment are physically installed at a customer site for the purpose of reducing energy use and demand, the load reduction realized at the time of the installation will persist for the useful life of the measure. Practices, on the other hand, are dependent on behavior, not technology.

Texas ROSE and TLSC further stated that it is inappropriate to mention one technology and one program without mentioning all of them as it could be argued that a measure does not qualify for the program unless it is specifically stated in the definitions. They asserted that the decision as to whether and how a measure is incorporated into the energy efficiency programs should be made after a thorough evaluation and review by the commission. They added that since HB 3693 directs the commission to consider and evaluate options, listing options in the definitions is not compliant with PURA §39.905(d), which requires evaluation and approval of program options by the commission.

The Sierra Club largely agreed with Texas ROSE, and commented that "thermal energy storage and removal of an inefficient appliance," as specific measures, should not be included in the definition. The Sierra Club believed that the definition of energy efficiency measures as "equipment, material and practices at a customer's site that result in a reduction in electric energy consumption or demand" may need further refinement. The Sierra Club supported including both physical infrastructure and behavioral changes in the definition of energy efficiency, but it wanted to make sure that money is spent on practices that will actually persist. The Sierra Club suggested that the definition include a requirement that the energy reduction persist over at least a five-year period.

Commission response

The commission does not agree with the proposition that practices should be eliminated from the definition. Technologies like thermal storage may depend on both installation of equipment and changes in customers' practices for buying and using energy. The coupling of the technology and changes in practices has the potential, however, to produce demand savings in a cost-effective manner. The commission does not intend to foreclose such options in adopting the rule; rather, the rule will put the onus on EESPs to develop cost-effective energy-efficiency projects that provide verifiable savings and put the onus on the utilities to select the programs that will best meet the goals of the statute and rule.

The commission also concludes that it is appropriate to mention specific technologies in the definition to resolve the uncertainty that has existed with respect to such technologies. Mentioning specific technologies does not imply a preference for these technologies, and their proponents will still have to satisfy the utility that a technology proposed to the utility delivers demand and energy savings in a cost-effective manner.

The commission does not adopt the Sierra Club's proposal to add to the definition that an energy reduction persists over at least a five-year period. The commission believes that measures with a shorter life, such as air conditioner tune-up programs, may be able to provide cost-effective savings.

Cities proposed modifying the definition of "energy efficiency program" in subsection (c)(11) to ensure the aggregate of the energy efficiency activities are specifically "cost-effective."

Commission response

The commission does not believe that this change is necessary. The limitation on incentive payments in subsection (g) is 100% of avoided cost, and the cost caps and bonus calculation provide incentives to meet the savings goals in a cost-effective manner.

Good Company proposed modifying the definition of "energy efficiency service provider" in subsection (c)(13) to limit a commercial customer acting as its own EESP to a customer with a peak load exceeding 50 kW.

ARM contended that the definition of "energy efficiency service provider" in proposed subsection (c)(13) should include only REPs and competitive EESPs, and not customers of any kind. ARM expressed concern that if an electric utility can distribute program funds directly to a commercial customer, a REP's ability to fulfill this expanded role would be undermined. ARM suggested that allowing REPs to access program funds on behalf of their commercial customers would not deprive those customers of the benefits of the utility's energy efficiency programs. TXU agreed with ARM.

Commission response

The commission agrees with Good Company's proposed modification and disagrees with ARM's proposal to include only REPs and EESPs. The commission believes that Good Company's proposal would allow for the inclusion of commercial customers that are of a size that they are likely to have the expertise and other resources to participate directly in the program as EESPs. Customers have participated in the program as EESPs in the past and the commission believes that this has been a valuable feature for these customers. It does not believe that including commercial customers in this role would inhibit REP participation in the program.

Cities proposed modifying the definition of "energy savings" in subsection (c)(14) to specify the quantifiable reduction in a customer's consumption of energy "that is attributable to energy efficiency measures."

TXCHPI supported modifying the definition of "energy savings" to specify a quantifiable reduction in a customer's consumption of energy, including the net energy savings from combined heat and power (CHP). TXCHPI stated that, without this change, the definition may be considered too limiting.

Commission response

The commission is adopting Cities' clarification that the definition of energy savings should refer to savings attributable to energy efficiency measures. However, the commission does not adopt TXCHPI's proposal to modify the definition to include CHP. There is no need to refer to a specific technology in this definition.

Cities proposed modifying the definition of "growth in demand" in subsection (c)(15) to specify the annual increase in "electric" demand in the Texas portion of an electric utility's service area at time of peak demand, as measured in accordance with this section.

Commission response

The commission does not believe that it is necessary to include "electric" in the definition of "growth in demand." In context the definition clearly refers to electric demand.

Cities proposed modifying the definition of "inspection" in subsection (c)(18) to clarify that the energy saving or demand reduction is "attributable to that measure."

Commission response

The addition of "attributable to that measure" is unnecessary, because the definition refers to an energy efficiency measure that "is producing" energy savings.

Texas ROSE and TLSC commented, with regard to subsection (c)(19), that load control is defined as an activity that can be conducted by the utility or an independent system operator. Noting their concern about the reliability of such intermingling of these activities as discussed elsewhere in these comments, they recommended the definition be amended by deleting "an independent system operator." Public Citizen, Environmental Defense and SEED Coalition commented that reference to the independent system operator is potentially misleading, that "electric utility" should replace "independent system operator," and that it should specifically state that "load control activities of the independent system operator are not subject to this rule." The Sierra Club also recommended that this subsection not refer to "an independent operator."

Commission response

The commission is also concerned about the intermingling of activities and payments. However, the commission does not agree with Sierra Club, Texas ROSE and TLSC's proposed deletion of "independent system operator," because there may be different control options that will result in cost-effective, verifiable demand savings but that do not represent duplicative payments for the same service. For the same reason, the commission does not adopt Public Citizen, Environmental Defense and SEED's proposal to replace "independent system operator" with "electric utility."

Cities proposed modifying the definition of "load management" in subsection (c)(20). Cities stated that load control activities are those that result in a reduction in peak demand on an electric utility system or a shifting of "electric demand" from a peak to an off-peak period or from high-price periods to lower price periods. Nucor stated that the legislature chose specifically to endorse the continuation of existing load management standard offer programs developed for industrial customers, and that the proposed rule should clarify that those successful programs are not frozen in place, but should be expanded by individual utilities.

Commission response

The commission does not agree with Cities' proposal to change the definition of load management. The commission concludes that the definition in the proposed rule accurately describes load management. The commission does not agree with Nucor's comments. This issue is discussed in more detail below.

Cities proposed modifying the definition of "market transformation program" in subsection (c)(21) to state that it is defined as a "Strategic program that induces lasting structural or behavioral changes in the market," instead of "strategic efforts to induce" those changes.

Commission response

The commission agrees with Cities' proposed modification, insofar as it suggests that the programs be referred to as strategic programs, but it concludes that the definition should retain the concept that the programs are efforts to induce changes and avoid implying that they must be successful. Obviously, the goal of the statute and rule is to implement successful programs, but the rule should recognize that pursuing innovative programs in a competitive environment involves some risk that programs will not immediately succeed and some may not succeed at all.

Good Company proposed modifying the definition of "peak demand reduction" in proposed subsection (c)(25) to refer to a reduction in demand on the utility system "throughout" the utility system's peak period, instead of "during" the system's peak period. In addition, Good Company proposed adding a new definition for "peak demand response," which would refer to the capability to reduce demand on the utility system throughout the utility system's peak period. Good Company noted that the previous definition of "peak demand reduction" calculated the reduction as the maximum average demand reduction over a period of one hour during the peak period. Good Company stated this definition was addressed in the Summit Blue report (Project Number 30170), which stated that these one-hour reductions may not meet commission requirements that measures contribute to a "reduction in growth of demand ... measured at the utility's annual system peak." Good Company stated that Summit Blue recommended that the new definition require load reductions to occur throughout the entire Peak Period. Good Company noted that the new definition, as written, is quite vague, and could be interpreted to mean either one hour during the peak period, or throughout the entire period. Good Company noted that it is important to distinguish demand reduction resulting from energy efficiency measures, which should be sustained over the entire period, from that associated with a demand response program, which should be "available" over the entire period.

Commission response

The commission agrees with Good Company's modification that would change the definition to mean a reduction in demand on the utility system *throughout* the utility system's peak period or, in connection with a demand response program, the availability for demand reductions over the entire peak period.

Sierra Club proposed modifying the definition of "peak period" in subsection (c)(26) since, in Texas, that period is from one p.m. to seven p.m. Nucor agreed, and also recommended removing the month of May and suggested that matching the peak period for this rule with the peak period utilized by the commission, ERCOT and utilities for utility planning and cost allocation purposes would be in the public interest.

Commission response

The commission agrees with modifying the definition from one p.m. to seven p.m., and removing the month of May.

Good Company proposed modifying the definition of "standard offer contract" in subsection (c)(28) to remove the reference to energy and peak demand savings achieved "through the installation of energy efficiency measures at electric customer sites."

Commission response

The commission agrees with the deletion of "through the installation of energy efficiency measures at electric customer sites." The definition of "energy efficiency measures," in subsection (c)(9), allows for removal or installation of an inefficient appliance. This change would make the two definitions consistent.

TXU Energy proposed a new definition for "capacity factor" to be defined as "the ratio of the annual energy savings goal, in kWh, to the peak demand goal for the year, measured in kW, multiplied by the number of hours in the year."

Commission response

The commission agrees with the inclusion of a definition of "capacity factor."

Sierra Club, Texas ROSE and TLSC proposed a new definition for "targeted energy efficiency program" to be "the targeted energy efficiency program under PURA §39.903 and §30.905 operated by local agencies and coordinated with other funds that are administered by the Texas Department of Housing and Community Affairs." Texas ROSE and TLSC stated that using this definition distinguishes the weatherization program that piggybacks on the federal program from the Hard-to-Reach standard offer program and other programs that may serve low-income consumers but follow different standards and guidelines.

Commission response

The commission does not agree with the inclusion of "targeted energy efficiency program" or "low-income targeted energy efficiency program," as there is not a need to refer to specific programs or specify that they be administered by another state agency. Funding issues have arisen with respect to this program in the past, and the rule should be flexible enough to continue the

programs by different means, if funding is not available for the Department of Housing and Community Affairs to operate them.

§25.181(d): Cost Effectiveness Standard

Cities proposed modifying proposed §25.181(d), the cost-effectiveness standard, as follows: "An energy efficiency program is deemed to be cost-effective if the total cost of the program is less than the net economic benefits of the program to retail consumers." In addition, Public Citizen, Environmental Defense, SEED, Nucor, Texas ROSE and TLSC argued that the cost effectiveness standard should reflect avoided costs of the additional transmission and distribution in the retail electricity cost avoided. Therefore, they stated that consumers would make decisions on the value of efficiency compared to their retail costs, which vary by service area, which will, in turn, attract EESPs into areas where they are most needed. Texas ROSE and TLSC argued that the avoided cost should include the cost of avoided transmission costs so that higher incentives can be allowed for renewable demand side management (DSM) measures and the highest efficiency end-use technologies that are not customarily installed under the standard offer programs. They commented that as standards in the market increase, higher levels of efficiency should be obtained through utility programs and accelerating the acceptance of the higher end, and higher cost, technologies may require a higher level of incentive to stimulate the market. The Sierra Club made a similar argument and also stated that one possibility of a cost more reflective of the actual cost of energy might be to use regional retail prices of energy, which might be more reflective of the true cost of competition and providing energy and transmission and distribution. Reliant's public hearing statement opposed Public Citizen proposal to rely on retail prices. Reliant believed that capacity and energy cost is already double dipping and inflating the avoided cost would be amplified under this proposal.

TXCHPI recommended the addition of a standard for the calculation of the value of the natural gas saved under the cost-effectiveness standard. TXCHPI noted all CHP applications will be accompanied by an engineering analysis of the project, including specifications for construction and a payback or cost benefit analysis of the project.

Commission response

The commission does not agree with Cities' proposed modifications regarding "net economic benefits" considered from the perspective of the customers. One of the objectives of the rule is to simplify key program elements, to facilitate participation of energy service providers and customers in energy efficiency program. Different customer classes, different customers, and different energy efficiency measures are likely to have different "net economic benefits," and those costs would be difficult for utilities and EESPs to assess. The commission concludes that the rule will create incentives for utilities to operate these programs in a cost-effective manner. Presumably this will meet the Cities' objectives. In addition, the commission does not agree with the inclusion of avoided costs of transmission and distribution or establishing separate avoided costs based on retail costs in each service area. This issue is discussed in greater detail above.

The commission declines to adopt TXCHPI's recommendation to add a standard for the calculation of the value of natural gas. If each project will require a cost-benefit analysis, as TXCHPI indicated in its comments, the utility receiving a proposal for combined heat and power should have a basis for evaluating whether the benefits exceed the costs, from the utility's perspective. Based on their experience in evaluating such proposals, it may be possible to adopt more specific standards for evaluating such proposals in a future revision of the rule.

EUMMOT proposed that actual or allocated research and development and administrative costs be excluded from the cost-effectiveness standard. CCET agreed.

Commission response

The commission disagrees with EUMMOT and CCET's proposal to exclude administrative and research and development costs from the cost-effectiveness standard. The commission believes that, in order to accurately assess the cost-effectiveness of individual programs, administrative costs, including costs for research and development, should be considered.

Nucor commented that the initial avoided cost of capacity should be $90/kW per year. Additionally, Nucor requested that the commission apply a simple inflator to the avoided cost of capacity figure used in the 2000 rule or, at worst, the figure in the 2005 rule, and work with interested parties to set a reasonable and transparent standard for determining the cost in 2009. Nucor stated that the cost effectiveness of energy efficiency programs will be appropriately evaluated against an avoided cost standard in the proposed rule. Nucor noted that while the commission's proposed rule develops a clear-cut standard for avoided energy cost, the avoided capacity cost standard is somewhat vague and the value assigned for purposes of the rule appears too low. Nucor stated the increase in the avoided cost of capacity from $78.50/kW in the 2005 rule to $80.00/kW in the proposed rule is too low. Nucor proposed that the commission raise the avoided cost of capacity in the proposed rule by at least the amount of inflation occurring in the Consumer Price Index compiled by the Bureau of Labor Statistics since 2000. Nucor noted using that measure, the $78.50/kW used in 2000 would be $95.25/kW in today's dollars. Nucor noted that, at a minimum, the commission should allow for inflation based on the 2005 rule, which would set the avoided cost of capacity at $83.98/kW. Nucor stated this would be a good stopgap measure until the commission has a chance to evaluate and incorporate more precise methods for recognizing the enormous increases in the cost of gas turbine units, which have increased in cost in recent years far beyond the general rate of inflation. Nucor cited recent testimony before the Michigan Public Service Commission that suggested that gas simple cycle installed costs have gone from $517kW in 2005 to $713 per kW in 2007, and a study prepared for the Edison Foundation, by the Brattle Group that reported that the cost of gas turbines increased by seventeen percent during 2006 alone.

Nucor stated that underestimating the avoided cost of capacity will undervalue and minimize the cost effectiveness of energy efficiency programs. Nucor stated, in contrast, §25.181(d)(2)(B) adopts a straightforward measure for the avoided cost of energy, using the "simple average of the market clearing price in ERCOT for balancing energy for the previous calendar year." However, Nucor noted that the methodology, which reflects the previous year's energy prices, fails to reflect current and future energy costs. Nucor stated that since energy efficiency typically is captured over a long period of time, such as where residential consumers receive incentives to improve home insulation, a backward-looking avoided cost of energy standard is perhaps not the best measure to employ over the long term. Nucor recommended that the commission consider whether some inflation escalation factor should be applied to the avoided cost of energy to properly reflect these concerns.

Public Citizen, Environmental Defense and SEED commented that subsection (d)(2) should be amended to require that energy costs be based on retail electricity costs, such as fuel cost, generation, transmission and distribution.

CenterPoint recommended that the "cost-effectiveness standard" provide that adjustments, if any, to the avoided cost of capacity and the avoided cost of energy be calculated by May 31 of each year using the most recent data for avoided capacity costs and the most current twelve months of data for avoided energy costs, because budgeting for energy efficiency programs generally occurs around the middle of the calendar year and changes in programs and program incentives are usually announced in the Fall and go into effect on January 1 of the following year. Any revised cost-effectiveness standard resulting from those calculations would not apply until January 1 of the following calendar year. CenterPoint stated while the recalculation of avoided capacity cost every two years and the recalculation of avoided energy costs every year should not be time consuming processes, lead time will be necessary before the revised cost-effectiveness standard is applied to an energy efficiency program and the program costs, and particularly before the incentives could be adjusted, without prejudicing customers, contractors, or the EESPs who have already committed to the program. CenterPoint noted that the proposed rule calculates avoided capacity at the capital cost of a "peaking unit" and avoided energy on the average of the market clearing price for balancing energy across an entire year, and potentially that creates a mismatch in avoided costs; thus, CenterPoint believed the issue merits additional study and recommended not to change the rule at this time.

Commission response

The commission notes, in connection with Nucor's suggestion to include parties in determining avoided capacity cost calculations, that the commission intends to work with interested parties in developing avoided capacity costs. The commission held a workshop on the rule in late 2007, and parties had an opportunity to present their views on any aspect of the rule. Good Company provided a paper in support of including transmission and distribution costs in the avoided cost calculation. The commission will continue to work with interested parties with respect to the implementation of the rule. In the case of avoided capacity costs, the staff relied on a National Regulatory Research Institute study, which was also used in P.U.C. Docket Number 21074. The avoided capacity costs in the proposed rule were based on a study presented in *In the Matter of the Application of Consumers Energy Company for Approval of a Balanced Energy Initiative and for Other Relief,* Exh. WEG-4 at 14 (September 21, 2007). The commission recognizes that there have been recent reports of increases in the costs that are important in the construction of new electric generating facilities, but it believes that the adjustment process in the rule is adequate to capture the impact of these changes, and that it is not critical to adjust the avoided cost in the manner that Nucor suggests now. As is pointed out above, the budget caps are likely to be the limiting factor in utilities' decisions relating to program selection and incentive levels in the near future, and increasing the avoided costs would probably have little impact on their decisions. With respect to a "simple inflator" for the avoided cost of capacity, such costs are not likely to correlate closely with consumer cost indices. The commission is not adopting Nucor's suggestions relating to avoided costs.

The commission believes that CenterPoint's comments imply a need for greater flexibility in the rule and a target date for making changes in avoided capacity costs. The commission is adopting a rule providing for an annual review of capacity costs, with the objective of adopting any change by May 1, 2009, for use in 2010.

EUMMOT proposed an allowance for a transition from balancing energy prices to zonal average of locational marginal prices (LMPZs) in the future as a basis for changing avoided energy costs. EUMMOT noted that, upon implementation of the nodal market in ERCOT, the balancing energy market will be discontinued, and the analogous concept would be LMPZs. Reliant also proposed a similar use of zonal prices. EUMMOT suggested further that the avoided energy costs should be based upon the average energy price solely during peak hours; or, in the alternative, a minimum or "floor" price established to offset the detrimental effect of averaging extremely low or even negative energy prices as occasionally witnessed during off-peak periods. EUMMOT suggested including these extremely low--or even negative--prices in the average only serves to reduce the value of the avoided energy costs.

Commission response

The commission agrees with EUMMOT and Reliant's recommendation to use the zonal average of locational marginal prices in the future as a basis for changing avoided energy costs. As EUMMOT and Reliant have commented, although the $0.055/kWh cost is being adjusted annually based on MCPE and is appropriate in the current market, when the nodal market is implemented, a different calculation, based on a simple average of the load zone locational marginal prices will be more appropriate. The commission also agrees with EUMMOT that using peak hour prices will more accurately reflect the avoided costs of serving customers during peak hours, which is consistent with the demand reduction goal of the program.

§25.181(e): Annual Energy Efficiency Goals

Cities proposed modifying the proposed subsection (e), annual energy efficiency goals, to require all programs to be "cost-effective" and "designed" to achieve at least a fifteen percent reduction in the electric utility's annual growth in demand of residential and commercial customers by December 31, 2008; and twenty percent of the electric utility's annual growth in demand of residential and commercial customers by December 31, 2009.

Sierra Club proposed that subsection (e) should require utilities to continue to make available, at 2007 funding and participation levels, any load management standard offer programs developed for industrial customers and implemented prior to May 1, 2007. It would also require utilities to report on industrial programs, and they would be encouraged to expand these programs if industrial consumers agree to participate and funding sources are available that do not take away from the other programs. The Sierra Club stated there was nothing in the law that would prevent a utility from offering new industrial efficiency programs, although how it could pay for such programs is unclear since, by statute, the payments must correspond to the amount that is contributed by customer class, and, with most industrial customers now exempt, it would be virtually impossible to add more programs using the required programs and funding source.

Commission response

The commission does not agree that Cities' proposed modification of proposed subsection (e) are needed. These changes merely amplify objectives and requirements that are expressed elsewhere in the rule. The commission also does not agree

with the inclusion of the Sierra Club's proposed modifications to subsection (e) relating to load management standard offer programs. The commission recognizes that the amended law does not preclude the utilities from operating industrial programs, but, as is discussed above, the clear import of the amendments in HB 3693 was to curtail industrial programs, except to the extent that they are grandfathered under PURA §39.905(a)(6).

Cities also proposed modifying subsection (e)(1) to eliminate the provision that would permit any reduction in growth in residential and commercial peak demand that is achieved in 2007 in excess of ten percent of a utility's demand savings goal to apply to the required savings in 2008. Cities proposed modifying subsection (e)(1)(A) to require that each year's historical demand for residential and commercial customers be normalized to adjust for extraordinary weather fluctuations, using weather data for the most recent ten years. Texas ROSE and TLSC and Sierra Club also supported removing all language from subsection (e)(1) regarding "carry over" of reduction of growth in demand. The Sierra Club stated that they understand that this provision is offered as a transitional measure as the rule is implemented, but they do not believe it matches legislative intent, which was to maximize the amount of energy efficiency gained.

Good Company commented that §25.181(e)(1) allows a utility to carry over excess reduction in demand over ten percent in 2007 to 2008. Good Company stated if the efficiency rule changes that will apply to 2008 expand the definition of "peak demand reduction" to reductions that occur "throughout the utility system's peak period," this section will allow utilities to carry over demand savings achieved under the previous definition, which allowed reductions to occur over a period of one hour, exaggerating the actual demand reduction achieved, and will result in underperformance by utilities. Good Company stated the new definition should be applied in determining the quantity of the carryover reduction in demand.

The Sierra Club also commented on the provision that would increase the savings achieved through the hard-to-reach (HTR) customers to reflect the reality that the calculation of demand is now based only on commercial and residential demand, and in most cases will not include industrial demand. At the public hearing, Texas ROSE and TLSC supported the Sierra Club's position for calculation the goals and what should be done for requirements for achieving savings for HTR. They stated that subsection (e)(1)(E) should be changed so that savings achieved through hard-to-reach programs would be no less than ten percent of the utility's demand reduction goal. Sierra Club agreed, but added that the commission should look at actual expenditures levels currently and attempt to find an appropriate percentage that would encourage more use of these funds, without taking away the flexibility of the utilities to adopt other needed programs.

EUMMOT stated that the proposed ratchet in subsection (e)(1)(D) in the demand goal should be removed. EUMMOT stated that, particularly over the next three years, there is no need for this ratchet as the goal as a percentage of load growth will increase significantly each year. EUMMOT stated this should translate into a higher goal in terms of megawatts each year. In addition, EUMMOT stated there may be situations in which the proposed ratchet could result in the establishment of an unattainable goal. EUMMOT noted, for example, that if a utility sold a portion of its service area, then that utility could be saddled with the same megawatt goal, but a smaller customer base and geographical area through which it could be achieved. EUMMOT stated that PURA §39.905(a)(3) mandates that the utility achieve a certain percent reduction of its annual growth in demand, with "annual growth in demand" a clearly defined calculation in the statute. EUMMOT stated this definition does not include, nor purport to suggest, that a minimum, or "floor", of attainment be established based on a previous year's performance. EUMMOT stated, rather, the definition for growth in demand was crafted to recognize both the impacts of load growth within the utility's service territory, the impacts of the general marketplace for energy efficiency programs, and the broader effects of an annually fluctuating economy. EUMMOT noted it should be recognized that there is no guarantee of an escalating or even stable demand for energy efficiency initiatives. EUMMOT contended that market dynamics, such as program saturation, more stringent building codes, and tighter energy appliance standards, will potentially serve to reduce opportunities for energy efficiency programs and make the attainment of an annually escalating goal even more difficult. EUMMOT stated from a paradoxical perspective, this is ultimately what the rulemaking is trying to achieve. CenterPoint and Xcel agreed with EUMMOT. It recommended, rather than including a "ratchet" in the proposed rule under subsection (e)(l)(D), that it would be more appropriate for the commission to consider all aspects of such a provision when it conducts the study called for by PURA §39.905(b-2). CenterPoint stated that if the demand in a utility's service territory contracts, either because of economic conditions or because of overall increases in energy conservation or both, the "ratchet" would not be needed to encourage energy efficiency efforts and could penalize a utility for not being able to meet a non-statutory goal.

Commission response

The commission does not agree with Good Company, Cities, Sierra Club, Texas ROSE and TLSC's recommendation to remove the language from subsection (e)(1) regarding "carry over" of the reduction of growth in demand. The commission believes that, particularly in light of the fact that the industrial customer class participation in energy efficiency programs will be limited, the utilities may need the ability to carry-over savings. The commission notes that these carry-over savings constitute savings that are over and above the utilities' previous year goals. The commission agrees with Good Company's suggestion, in light of the modified definition of "peak demand period," that the new definition of peak demand period should apply in determining the quantity of the carryover reduction in demand.

With respect to the Cities' proposal to utilize "normalized growth in demand," as suggested for subsection (e)(1)(A) and (e)(1)(B) require that the utilities' growth in demand be calculated using the average, weather normalized demand growth over the five preceding years in each utility's territory.

The commission does not agree with EUMMOT, CenterPoint, and Xcel's arguments that subsection (e)(1)(D) should be deleted. The parties suggested that the "ratchet" provision was unnecessary, not a statutory goal, and contrary to the controlling legislation. The legislature has given the commission some discretion in how to implement the energy efficiency program under PURA §39.905, and that one of the important goals of the 2007 amendments to this section was to increase the level of energy efficiency improvements that utilities achieve. Demand growth can fluctuate with changes in the economy, but the projected long-term path for the Texas economy is significant growth. The commission believes that, in view of these circumstances, it is appropriate to maintain energy efficiency efforts, even if a

short-term downturn occurs in a utility service area. Consistent policy in this area is also important to provide opportunities that will support the growth of independent EESPs in Texas. If a long-term economic downturn occurs in any of the utility service areas, or if a sale of service territory occurs, the commission will have the ability to address this matter in a rule revision or in reviewing utilities' programs.

Good Company and ARM commented that subsection (e)(2) should be eliminated. Good Company specifically noted that §25.181(e)(2) calculates the energy savings goal as the demand goal multiplied by a thirty percent capacity factor (CF). Good Company appreciated the intent to encourage additional energy savings, but was concerned that this may result in discouraging the pursuit of both energy efficiency and demand response. Good Company stated a thirty percent CF would require saving 2,628 kWh per kW, compared to the average 2005 and 2006 value, 2,433 kWh per kW. Good Company stated that the energy goal may eliminate all demand response programs and most programs that primarily save energy during peak hours, resulting in TDUs only implementing energy efficiency programs that produce "flat" consumption, saving proportionately more energy during hours when prices are lower and when renewable energy such as wind will provide a substantial portion of generation. Good Company noted that, given the incentives created by the bonus structure, which encourages utilities to maximize net benefits, there is already a strong bias toward energy efficiency. At a thirty percent CF, an efficiency program would have avoided costs of $224 per kW as opposed to only $80 per kW for a demand response program. Good Company stated the proposed bonus structure provides sufficient incentives for the TDUs to make energy efficiency a high priority such that they would turn to demand response and load management after only they have exhausted cost effective energy efficiency opportunities. ARM raised similar concerns and noted that unlike the annual demand reduction goals specified in PURA §39.905(a)(3), the statute does not specify this energy savings goal. ARM was concerned that the imposition of this energy savings goal might unduly complicate the administration of the energy efficiency programs by electric utilities. ARM stated their strong view was that an appropriate energy savings goal is one that does not eliminate beneficial demand response programs. ARM noted given that proposed subsection (m) requires each electric utility to include energy savings information in its annual plan and report, the commission can assess the appropriateness of each electric utility's energy savings goal and, if necessary, direct the utility to modify it.

Commission response

The commission agrees with ARM's comments that the statute does not specify an energy savings goal. However, the commission concludes that including an energy savings goal is important and is within its discretion. It is obvious that many of the parties participating in this proceeding regard air emissions and global climate change as important concern to be addressed by the energy efficiency program. In addition, the Health and Safety Code directs that the air emission reductions resulting from energy efficiency programs be estimated. Energy savings are also an important part of the benefit for customers. All customers pay for energy, and residential customers pay directly only for energy. The commission understands the concerns that an energy goal may bias utilities against demand response programs in favor of programs that include energy savings. The utilities already report energy savings to the commission, but they have not been subject to an energy savings goal. Because the adoption of an aggressive energy goal might result in program selections by the utilities that would de-emphasize demand-reduction programs, the commission believes that a less aggressive goal for energy savings should be adopted. Accordingly, the commission is adopting an energy goal for utilities that is based on a twenty percent capacity factor.

The Sierra Club suggested that in §25.181(e)(3) should be modified to assure that the expenditures for efficiency correspond roughly to the amount paid by the customers in the wires charges, and that the electric utilities disclose the value of the programs that come from these charges.

Good Company proposed modifying subsection (e)(3)(A) to permit each electric utility to establish programs or standard incentive payments to achieve the section's objectives. Good Company felt it was necessary to allow for market transformation programs that might not include incentive payments, but rather focus on market education efforts or removal of market barriers. In subsection (e)(3)(B)(ii), Good Company proposed adding a provision for measures with limited market penetration to reduce avoided by a Net-to-Gross ratio to account for free-ridership. Good Company stated that the section declares measures ineligible that would be adopted in the absence of the project. Good Company noted this could limit many measures that have a component of free-ridership in a portion, but not all, of the population. Good Company recommended the commission could instead calculate a Net-to-Gross ratio for these measures, as adopted in California, that reduces incentive levels to account for free-ridership.

TXCHPI requested consideration of the prohibitions in proposed subsection (e)(3)(B)(i) relating to "eliminating an existing function," and take official notice of the functions that are purposefully eliminated by clean, efficient CHP installation and replaced with an alternative function.

Commission response

The commission does not agree with the Sierra Club's recommendation that language be added to ensure that the expenditures for efficiency correspond to the amount paid by the customers and that the utilities disclose the value of the programs. Such a provision would be duplicative of the cost-effectiveness standards in the rule, to some degree, and the rule requires reporting to the commission and participating customers, without the additional disclosure proposed by Sierra Club. The reports to the commission are readily accessible to customers on the commission's web site, and the utilities in recent years have posted a summary report on the Texas Efficiency web site that would be useful for customers.

The commission agrees with Good Company's recommendation permit utilities to adopt programs that do not include incentive payments, such as educational programs, and is amending subsection (e)(3) to permit, rather than require, incentives. The commission also does agree with Good Company's recommendation to modify subsection (e)(3)(B)(ii) to permit some measures to be eligible in the program that would be adopted in absence of the project, with discretion to use a net-to-gross adjustment or other programs modifications to reflect the fact that some customers will adopt the measures, even in the absence of the utility program.

The commission does not agree with TXCHPI's suggestion to amend the prohibition in subsection (e)(3)(B)(i) relating to "eliminating an existing function." The commission concludes that combined heating and power is not specifically "eliminating

an existing function." Rather, the commission believes that this technology represents an alternative choice, within the market, for customer to meet its energy needs and for utilities and customers to achieve energy savings.

First, Texas ROSE and TLSC proposed adding subsection (e)(3)(B) to require utilities to establish a program in which REPs pay incentives directly to end-use customers. Texas ROSE and TLSC, and the Sierra Club, also proposed adding subsection (e)(3)(C) to require an electric utility to establish standards to encourage the value of the incentives to be passed on to the end-use customer. Texas ROSE and TLSC also proposed adding subsection (e)(3)(D) to prohibit projects or measures that would reduce demand or energy by eliminating an existing function or shutting down a facility or operation; would be adopted even in the absence of the energy efficiency project; would result in negative environmental or health effects; would involve the installation of self-generation or cogeneration equipment, except for renewable DSM technologies; or would consist of a rate plan offered to customers by a retail electric provider. Texas ROSE and TLSC noted that their proposed subsection (e)(3)(D)(i) is similar to a provision in the current rule, except that the proposed rule would permit an appliance recycling program. They recommended that any appliance recycling program be evaluated and discussed in a public process with final approval by the commission vetted, as required by statute, and that the language allowing the program be deleted.

Texas ROSE and TLSC also commented that it is the responsibility of the commission to make distinctions in the energy efficiency rule to assure that ratepayer dollars spent on energy efficiency programs are spent on investments that provide the greatest overall return to the consumer in lower electricity costs and environmental improvement. They stated the proposed rule makes no distinction and provides no guidance for directing utilities toward program decisions that are in the best interests of the consumer and environmental improvement. Texas ROSE and TLSC disagree with provisions of the proposed rule that permits incentives to be paid for equipment that generates electricity, which except in the case of renewable DSM technologies, is prohibited under the current rule. They argued in favor of a provision like that in the current rule that requires an energy efficiency measure to have a useful life of at least ten years. Finally, they noted that rate plans rely on customer practices to alter the timing of energy use and have no verifiable useful life or persistence of savings, and they asserted that residential and low income consumers will be paying surcharges to cover the costs of advanced meters, which will benefit the REPs.

Commission response

The commission does not agree with Texas ROSE and TLSC's proposal to modify subsection (e)(3)(B) to require each utility to establish a program in which REPs pay incentives directly to end-use customers. The commission concludes that payments to customers are not necessarily the most effective use of utility resources that are being devoted to the energy efficiency program. The commission declines to adopt the Sierra Club, Texas ROSE and TLSC proposal to add subsection (e)(3)(C) to encourage each utility to establish standards to encourage that the value of incentives to be passed on to the end-use customer. The statute requires that the rules encourage the value of the incentives be passed on to the customer, but does not require the utility to establish specific standards. This issue is addressed in greater detail below.

The commission does not agree with Texas ROSE and TLSC's proposal for an additional subsection (e)(3)(D), which would set forth criteria for determining the eligibility of standard offer and market transformation programs for compensation or payments. The rule provides requirements for standard offer programs and market transformation programs but leaves the utilities a good deal of latitude, within the rules, in establishing such programs. The commission concludes that this latitude will permit utilities to respond to the challenges of meeting higher savings goals more effectively than standards that limit the utilities' discretion. Similarly, the commission concludes that utilities should have the latitude to permit appliance recycling programs and CHP, which will permit customers to meet their energy needs more efficiently. This rule will establish broad policy and give the utilities the discretion and incentive to meet the goals of the section in a cost-effective manner. This rulemaking proceeding has provided an opportunity to public comment on the benefits of appliance recycling and CHP, and the commission concludes that an additional opportunity is not warranted.

The commission does not believe that it should specify that "rate plans" do not qualify for energy efficiency program incentives. One of the objectives of the 2007 legislative changes was to encourage retail providers to participate in energy efficiency programs, and they may decide to do so through programs that have a rate component. Prohibiting them from receiving incentives for rates may narrow their options for participating in energy efficiency programs. However, the commission recognizes that the REPs have competitive reasons to develop and deploy innovative rate plans that provide benefits to their customers, and that in deploying such plans they seek to gain an advantage over other REPs that are competing for retail customers. The commission believes that the utilities will need to carefully assess proposals from REPs to ensure that they are consistent with this section and the objectives of the energy efficiency program, but it does not believe that the rule should prohibit programs that include a rate component.

§25.181(f): Cost-Recovery Factor

Cities proposed modifying subsection (f) to permit the utility to timely recover the reasonable "incremental" costs of providing energy efficiency programs "to the extent such costs are not already recoverable through the utility's base rates." Additionally, Cities sought to eliminate the "forecast" of the energy efficiency program costs and add that costs recoverable through the Energy Efficiency Cost Recovery Factor (EECRF) "shall be based on prudent test year levels adjusted for known and measurable changes" and reflect the spending necessary to meet the utility's goals. Cities recommended that energy efficiency cost recovery provisions be based upon actual incremental costs incurred by utilities to encourage cost-effective energy efficiency and demand-side management programs that provide verified measurable net economic benefits to consumers.

Texas ROSE and TLSC proposed modifying §25.181(f) so that an EECRF rate schedule is permissible, rather than mandatory, and recommended that the forecast of the energy efficiency program costs reflect the spending necessary to meet the utility's goals under this section. Texas ROSE and TLSC commented that there is no statutory basis for setting the EECRF using future budgets, because the statute uses the term expenditures. They asserted that since payments to EESPs are based on completed work and actual costs, the same principle should apply to the EECRF. OPC and TIEC also argued that the plain language of the statute refers to "establishing an energy efficiency

cost recovery factor for ensuring timely and reasonable cost recovery for utility expenditures made to satisfy the goal" and that "expenditures made" means recovery of costs incurred and not recovery of costs to be incurred. ARM also opposed the use of forecasted costs.

OPC also disagreed with the recovery of the cost of energy efficiency programs, based on forecasted budgets, and suggested that the commission amend the rule to allow recovery of historical costs through the surcharge. OPC noted that residential and small business customers will bear the brunt of the program costs, based on the proposal to create a non-bypassable surcharge to consumers to recover the costs of the energy efficiency programs outside a base rate case and the exclusion of industrial customers from any energy efficiency programs. OPC stated that residential and small business customers have a right to prudent business operations on the part of the utilities and electric service providers, energy efficiency products that allow them to directly share in the financial incentives created by the energy efficiency programs, assurance that any costs utilities seek to recover through the proposed surcharge are necessary and reasonable to meet the energy efficiency goals, and an equitable distribution of benefits among and within the customer classes. OPC argued that a future test year cost of service would be problematic and run counter to the traditional use of a historical test year for ratemaking in Texas.

TIEC noted that, in general, the use of recovery factors to allow utilities to recover energy efficiency costs outside of a rate case is disfavored in ratemaking and should be discouraged. TIEC stated that if a utility is under-recovering its costs, it should initiate a rate proceeding to recover such costs. TIEC stated that if a utility is allowed to recover costs on a piecemeal basis, a utility may double-recover, or over-recover its costs. TIEC noted additionally, that a comprehensive rate proceeding allows the commission to consider the full impacts of load growth and decide whether increased revenue from additional customers may offset cost increases. TIEC stated that these are fundamental ratemaking principles and are essential to maintain balanced regulation.

TIEC recognized that HB 3693 authorizes the commission to establish a cost recovery factor to ensure timely and reasonable cost recovery of energy efficiency costs, but argued that the proposed rule would make a significant departure from traditional ratemaking practices. P.U.C. Substantive Rule §25.231(a) provides that "rates are to be based upon an electric utility's cost of rendering service to the public during a historical test year, adjusted for known and measurable changes." TIEC noted that, with few exceptions, the commission has set rates based on historical costs. TIEC stated that similar cost recovery factors, such as the ERCOT TRCF, are based on historical costs. TIEC stated timely cost recovery does not mean that costs must be recovered contemporaneous with their occurrence. TIEC stated that using forecasted amounts could result in significant over- or under-collection of energy efficiency costs.

ARM's recommended a comprehensive revision to the proposed subsection (f). ARM noted that the "forecasted" costs that the proposed rule would permit in an EECRF are tied to PURA §39.905(b)(1), which requires the commission to adopt rules and procedures that establish an EECRF for "ensuring timely and reasonable cost recovery for utility expenditures made to satisfy the goal" of PURA §39.905. ARM commented that the "timely recovery" requirement in the statute is intended to permit the electric utility to recover its energy efficiency costs outside of the context of a general rate case, given the possibility of long periods elapsing between those proceedings. According to ARM, using historical annual costs would allow an assessment of the reasonableness of those costs prior to their inclusion in rates, and, consequently, the reconciliation proceeding in proposed subsection (f)(12) would not be necessary. ARM stated that the use of historical annual costs is consistent with the approach employed in proposed subsections (f)(4), (f)(6) and (h) to adjust the EECRF for historical annual under- and over-recoveries and for the energy efficiency performance bonus based on the electric utility's achievements in the previous calendar year. ARM stated, moreover, the use of historical energy efficiency costs would minimize the extent to which there is an under- or over-recovery of annual costs and annual revenues, and that the use of forecasted annual energy efficiency costs could result in a mismatch between the forecasted costs and the costs actually incurred.

EUMMOT noted that by implementing a cost recovery mechanism consistent with HB 3693, the utilities will receive more timely recovery of the costs necessary to operate these successful programs. EPE agreed, and stated that the proposed rule changes should allow utilities to receive more timely recovery of necessary costs incurred to implement successful standard offer and market transformation programs. Efficiency Texas proposed that utilities be given timely cost recovery of their energy efficiency expenditures, as well as a financial incentive payment for exceeding the legislature's minimum energy efficiency goal. Efficiency Texas stated that HB 3693 made clear that utilities were to be given timely cost recovery and that a "bonus" would be given to those utilities that exceed the energy efficiency goals.

Commission response

The commission does not agree with Cities, Texas ROSE and TLSC, OPC, TIEC, and ARM's suggestion to utilize "historical" rather than "forecast" of energy efficiency costs to permit the utilities to timely recover the reasonable costs of providing energy efficiency programs. The commission notes that PURA §39.905(b-1) states that the energy efficiency cost recovery mechanism may not result in an over-recovery of costs but may be adjusted each year to change rates to enable the utilities to match revenue to energy efficiency costs and incentives. Therefore, the commission believes that the process in the proposed rule, which it is adopting without major changes, ensures that no over-recovery will occur. The commission recognizes that the EECRF is a departure from established practice with respect to rate-setting, for energy efficiency expenditures, but it concludes that the legislature's directive for the utilities to meet higher savings goals and the explicit inclusion of provision for timely cost recovery in the statute supports this departure from past practice. As ARM notes, permitting recovery of historical costs outside of a general rate case affords utilities some benefit with respect to timeliness of cost recovery, but the commission concludes that, in view of the higher energy savings goals, the additional benefit of contemporaneous cost recovery, through the use of forecasted costs, is appropriate and consistent with the statute.

Texas ROSE and TLSC proposed that prior to implementing the EECRF, a utility would be required to file an independent review of its programs to verify that the programs are reasonable, prudent and nondiscriminatory. Texas ROSE and TLSC stated that efficiency costs should be included in rates with excess expenditures being covered by the EECRF between rate cases. This is consistent with standard ratemaking procedures and would permit energy efficiency costs to be reviewed by all parties, as are all

other expenditures. Cities proposed modifying subsection (f)(2) to specify that a utility's base rates shall be "designed to exclude all" energy efficiency program costs.

Commission response

The commission does not agree with Texas ROSE and TLSC's proposed modification of subsection (f)(2) to require an independent review of utility programs prior to implementing the EECRF. The commission believes that such a prior review would impede the objectives of timely cost recovery and higher program goals; in addition, it concludes that the rule adequately ensures that the programs are reasonable, prudent and non-discriminatory. The commission declines to include Cities' proposed modification to subsection (f)(2). The commission concludes that the rule being adopted will ensure that no over-recovery by the utilities will be permitted and that subsection (f)(2), as adopted, is more specific about the timing of excluding energy efficiency costs from base rates.

Cities proposed modifying subsection (f)(3) so that the EECRF would be calculated to recover the "prudently incurred incremental" costs associated with each "cost-effective energy efficiency" program from the customer classes that receive services under each program.

Xcel stated that the utility should be required to identify costs by customer class or submit factors to allocate costs among the customer classes "based upon the class allocation factors approved in the electric utility's last base rate case" and propose charges for the recovery of the costs. Xcel stated that class allocations are often very heavily debated in base rate case proceedings. It also recommended that the commission add a carrying charge component for over- or under-recovery balances. Xcel noted that carrying charges compensate both the utility and the ratepayer from balances due to over- or under-recoveries. Xcel stated in addition, carrying charges remove the financial regulatory lag from these expenditures and collections.

Commission response

The commission does not agree with Cities' proposed modification to subsection (f)(3). The concepts that the Cities would add to this subsection are adequately addressed in other provisions of the rule. The commission agrees with Xcel's suggestion that utilities should provide factors for allocating energy efficiency costs, based on the most recent base rate case. Providing this information will facilitate the processing of EECRF cases. In addition, the commission may adopt a rate-filing package to facilitate the review of requests for an EERCF. The commission does not agree that carrying charges should be applied to over- and under-recoveries. The costs and revenues will be reviewed on an annual basis, and any over- or under-recoveries will be promptly reflected in a revised EECRF. In addition, the rule provides for much more timely cost recovery than the normal rate-case process, so carrying charges on under-recoveries should not be a significant issue for utilities.

Cities proposed modifying subsection (f)(4) to specify that each year, a utility with an EECRF must file an application to adjust the EECRF in order to "eliminate," any over- or under-collection of energy efficiency costs resulting from the use of the EECRF.

Commission response

The commission believes that the rule being adopted addresses the over- and under-recovery of program costs, by requiring that adjustments to the EECRF "minimize" such over- and under-recoveries. The elimination of an under- or over-recovery may not be practical, because it could involve small amounts allocated over a large number of billing determinants.

Cities proposed adding language to subsection (f)(5) to establish that the utility has the burden of demonstrating that the amounts requested through the EECRF are justified in light of existing earnings of the utility during the test year period. TXU Energy proposed substituting "general rate proceeding" for "base rate case" in this subsection.

ARM noted that it is unclear how subsection (f)(5) works in concert with other proposed subsections. ARM stated that the establishment and adjustment of the EECRF in proposed subsection (f) is based on the concept of annual information, *i.e.*, forecasted annual energy efficiency program costs, the annual requirement to "true up" the EECRF to account for under-and over-recoveries, and the incorporation of an annual energy efficiency performance bonus amount based on the prior year. ARM noted that if the electric utility may change the EECRF in any general rate proceeding at any time during the year, as opposed to through a standardized annual process, it is unclear whether the new EECRF could properly reflect those annual adjustments. ARM stated that the only time that it would make sense for the electric utility to change its EECRF in a general rate case is when that proceeding involves the elimination of energy efficiency program costs from base rates, pursuant to proposed subsection (f)(2).

Commission response

The commission does not adopt Cities' suggestion with respect to burden of proof; subsection (f)(11), which describes the showing that a utility must make in an EECRF filing, implicitly establishes that the utility has the burden of proof in such a case. The commission agrees with TXU's suggestion that "base rate case" is better terminology. The commission agrees with ARM that a general rate proceeding may be impractical and could delay the implementation of cost recovery, but that this option may be useful, particularly in 2008. The schedule for adoption of this rule may make it difficult for utilities to file EERCF proceedings before May 1, 2008, and if a utility files a base rate case in late 2007 or during 2008, it may be possible for it to use the base rate case to establish a 2009 EECRF. For small utilities, it may also be desirable to use a rate base case to establish or modify an EERCF. Accordingly, the commission does not adopt the ARM suggestion.

TXU Energy recommended that energy efficiency costs not be recovered through a monthly customer charge. ARM stated that it is unclear whether an electric utility with an EECRF is required to annually seek approval of a modified EECRF that reflects all changes to the EECRF rate components that are specified in proposed subsection (f)(6). ARM also commented that while proposed subsection (f)(6) requires the EECRF to be set in a manner that adjusts for past over-or under-recovery of revenues, based on PURA §39.905(b-1), nothing in the proposed rule directly requires that the electric utility also propose changes to the EECRF that relate to forecasted annual energy efficiency costs, historical annual performance bonuses, or other annualized factors that impact the EECRF, to the extent that any of those factors change from year to year.

Commission response

The commission does not agree with TXU Energy's suggested deletion of "or a monthly customer charge" from subsection (f)(6). There may be utilities that are participating in energy efficiency programs that use a customer charge for energy

efficiency costs, and these utilities should have the flexibility to recover the costs through a monthly charge, with commission approval.

The commission does not entirely agree with ARM's suggestions. Subsection (f)(4) requires a utility to apply to adjust its EERCF on an annual basis to minimize any over- or under-recovery of costs. The rule clearly contemplates that changes in costs and bonuses be reflected in an order modifying the EERCF. However, wording changes are incorporated in the rule as adopted to make this explicit.

Cities proposed that a utility under subsection (f)(7) may "seek to" defer the costs of complying, and recommended including language regarding the recovery of deferred costs "to the extent such recovery is not prohibited by existing rate agreements."

CenterPoint proposed that subsection (f)(7) be amended to permit a utility that is unable to establish an EECRF as a result of a rate freeze to elect to defer the costs of complying with this section and any bonus that it would otherwise earn and to file notice of its election with the commission. Within thirty days of the utility's filing, the commission would issue an approval of the deferral, which could be done administratively. During the period of deferral, costs and bonuses would accrue carrying costs at the utility's last commission-approved weighted average cost of capital. The utility would be entitled to recover its deferred costs and bonuses through an energy efficiency cost recovery factor on the expiration of the rate freeze period. According to CenterPoint, its recommended changes to the deferral provision are intended to ensure that CenterPoint and other electric utilities that agree to multiple year rate freezes are not penalized by the rule. CenterPoint recommended deleting the reference to the year 2008, so that the provision is not interpreted to apply only to costs for the year 2008. CenterPoint would include carrying costs in the deferrals to allow electric utilities to recover the entirety of their costs and bonuses, which it argues would not be unfair or disadvantageous to Retail Electric Providers and consumers. CenterPoint stated that the approval process it proposed would allow electric utilities to recognize the deferrals for accounting purposes.

Commission response

The commission disagrees with Cities that the rule should provide only an opportunity to seek a deferral of energy-efficiency costs. The purpose of this provision is to put utilities that have agreed to multi-year rate freezes on the same footing as utilities that are not subject to such rate freezes. The rule would establish that rate-freeze utilities would have a right to defer these costs, if it is not inconsistent with a prior rate agreement that has been approved by the commission. The commission is not requiring that utilities electing to defer costs and bonuses file notice of that election. The commission concludes that the procedures for approval of an EERCF will also work for approval of an election to defer costs. Other parties that have an interest with respect to the deferral of costs should have an opportunity for expressing them, and for this reason it does not adopt the CenterPoint proposal that such applications be processed administratively. The commission expects that the utilities that intend to defer costs will file an application to do so on a timely basis, and concludes that a separate notice of an election is not necessary. The commission agrees that the deletion of the year 2008 from subsection (f)(7) is appropriate, so that the provision is not interpreted to apply only to costs for the year 2008. The commission also agrees that carrying costs should be included in the utility's ultimate cost recovery in the event of a deferral order, because the costs may have to be deferred for several years.

Commission response

Cities proposed modifying subsection (f)(10) so that a hearing, if requested, would be held no earlier than the first working day after the 45th day after the application is "determined to be sufficient," instead of "filed."

Commission response

The commission has changed the rule to trigger the hearing timeline to the date that a sufficient application is filed. This means that a hearing can be delayed if the utility failed to file a sufficient application. The commission does not adopt Cities' specific proposal, because the hearing date should be tied to when the parties had access to a sufficient application, not to a subsequent, indefinite date when the presiding officer determine that the application that had been filed is sufficient.

Cities proposed modifying subsection (f)(11)(A) to ensure that the costs to be recovered through the EECRF are reasonable "and necessary" to provide energy efficiency programs and not based on "costs to meet the utility's goals under this section." In addition, Good Company commented that this subsection should specify that the energy efficiency programs are "cost effective."

Commission response

The commission does not agree with Cities' and Good Company's suggestions. These concepts are set out elsewhere in the rule, the necessity of costs in subsection (f)(11)(A), and cost effectiveness in subsection (g).

TXU Energy proposed that subsection (f)(12) be amended to require a utility to apply to reconcile the costs it recovered through its EECRF every three years. TXU Energy expressed the view that a reconciliation would ensure appropriate review of expenditures and revenues, particularly for utilities who do not file for base rate cases for several years.

CenterPoint commented that the rule should provide that the costs of contested case proceedings should not be considered part of program costs or included in the calculation of net benefits, but should be recovered through the EECRF. CenterPoint stated the subsections (f)(9) through (f)(12) of the proposed rule, as amended by the Staff memo dated November 1, 2007, create a somewhat cumbersome process for establishing an EECRF. CenterPoint stated that the process is compounded by adding a reconciliation of the costs recovered through the EECRF at least every three years. CenterPoint understood and appreciated the commission's desire to subject the recovery of costs and bonuses to review through the contested case process, but if each EECRF filing is going to be a contested case, then there is no point in having a reconciliation, and conversely, if there is going to be a reconciliation of costs at least every three years, there is no need to have each EECRF filing be subject to anything beyond commission staff review and administrative approval. CenterPoint noted that the key consideration here is that the encouragement to utilities to increase their energy efficiency offerings, and the operation of the EECRF consistent with PURA §39.905(b) and (b-1) should not get bogged down by the contested case process. CenterPoint stressed that the commission must recognize that the contested case process will impose costs on the utility, among which will be the utility's reimbursement of municipal "rate case" expenses.

ARM stated that proposed subsection (f)(12) appears to contemplate that all such changed factors can be addressed in a proceeding to adjust the EECRF, but it does not go so far as to require this. ARM's primary concern here was to ensure that the process in proposed subsection (f) provide REPs with adequate notice of proposed changes to the EECRF and that any adjusted EECRF be approved by the commission using a standardized process from year to year, so that there is a requisite degree of certainty with respect to what those adjustments may be and when they will occur. ARM supported a mandatory annual reconciliation of the EECRF, in which all components to the EECRF that have changed are addressed at the same time. ARM did not support the adoption of the inadvertently omitted language in proposed subsection (f)(12), as specified in the memo issued by commission staff.

Commission response

The commission agrees with TXU Energy that the rule should require a utility to apply at least every three years to reconcile costs recovered through its EECRF. With respect to CenterPoint's comments that an annual EECRF filing may not be useful in light of a three-year reconciliation proceeding requirement, the commission believes that an annual EECRF filing will provide timely cost recovery, which will be advantageous to utilities, particularly if their budgets increase to meet higher energy-efficiency goals. The scope of the annual filings is limited, so that the expedited approval process should be workable. The commission does not believe that it need address the issue of recovery of expenses related to the annual EECRF proceeding and reconciliation proceedings in the rule. It is not clear whether either of these filings will result in significant additional administrative costs or whether the cities with regulatory authority will choose to participate in them. The reconciliation is intended to be a more thorough review of the energy efficiency programs and costs, and the commission does not believe that it is practical to conduct this level of review annually, as ARM proposed.

§25.181(g): Incentive Payments

Cities proposed modifying proposed §25.181(g) to provide that the sum of incentive payments and other program costs could not exceed the net economic savings to retail customers associated with such energy efficiency programs. Cities opined that the proposed energy efficiency incentives, cost recovery provisions, and electric utility performance bonus provisions are overly-generous and are likely to lead to inflated estimates of energy efficiency impacts and excessive spending on programs, and that such spending has the potential to eliminate any net benefit that otherwise might accrue to consumers. Cities supported a more deliberate effort to encourage energy efficiency, focusing on programs with the most promise and for which consumer benefits have been demonstrated.

TXU Energy proposed including language to permit utilities to adjust incentive payments "upwards" during the program year, and also proposed that such adjustments should be publicized in advance in the materials used by the utility. TXU Energy noted that subsection (g) could cause difficulty for REPs that design and administer programs under utility guidelines if those amounts were to be reduced during the program year. TXU Energy suggested that upward adjustments would not likely cause REPs this difficulty, but downward adjustments could.

EUMMOT proposed including a provision that would permit a utility to offer different incentive levels for the purposes of either encouraging energy efficiency measures that have been historically underutilized or to provide additional incentive for measures that have historically been over emphasized, under the standard incentive levels. EUMMOT believed that disclosure of incentives provided to program participants is unnecessary and may be difficult to impose. EUMMOT also suggested explicit authorization for a utility to offer higher incentive levels for projects in areas that have traditionally been underserved by the utility's energy efficiency programs.

Public Citizen, Environmental Defense, SEED suggested differential incentives. In their view, flexibility with respect to incentives would allow to utilities to reach hard-to-reach customers and underserved areas, and foster innovative and emerging technologies and market transformation, especially for renewable DSM. Sierra Club proposed that subsection (f)(9)(D) should include caps on incentive levels for a standard offer program not in excess of 100% of avoided cost for hard-to-reach customers, fifty percent of avoided cost for other residential and small commercial customers, and thirty-five percent of avoided cost for large commercial and industrial customers. It also proposed that for programs where there are additional avoided costs because of transmission and distribution constraints identified by the utility, the incentives could exceed these caps, as long as they do not exceed 100% of avoided costs. Texas ROSE and TLSC proposed that subsection (g) should include similar caps on incentive levels. In particular, they proposed the same cap for hard-to-reach customers; 100% of avoided costs, including the avoided costs of transmission and distribution, for installations of renewable DSM technologies; seventy-five percent of avoided costs for programs that produce energy savings; and fifty percent of avoided costs for load control and load management programs. Texas ROSE and TLSC favored a cap of 100% of avoided costs for low-income and hard-to-reach customer programs, to make energy efficiency investments affordable for these customers. In their view, a program for these customers must be designed to require no payment from the consumer. In support of a cap of seventy-five percent of avoided costs for programs that produce both energy savings and demand reductions, they argued that current programs are fully subscribed at lower levels, and when the level of efficiency increases along with the costs to the consumer the higher incentive caps may apply.

Finally, Texas ROSE and TLSC suggested that energy savings are unlikely for load control and load management programs. Rather, energy use may increase. They commented that unlike other programs that permanently reduce electricity use, these programs are designed to reduce demand to maintain system reliability during peak periods. Because the programs have no track record for saving energy, they provide no value as an emissions reduction tool. Thus, the value should be capped at a lower level than programs that save energy and also reduce emissions.

The Sierra Club stated that the proposal gave considerable flexibility to the utilities in setting incentive payments, as long as they do not exceed 100% of the avoided costs. Sierra Club suggested that the importance of this section is directly related to how avoided costs are determined. In agreement with Texas ROSE and TLSC, Sierra Club believed that utilities should be permitted to offer higher incentives for renewable DSM measures because of the avoided transmission costs, which are not adequately addressed in the proposed rules. The Sierra Club stated they were supportive of this "flexible" language only if avoided costs were more reflective of the actual retail prices that are avoided, and for renewable DSM, of avoided transmission costs. The Sierra Club noted that otherwise, this flexible lan-

guage should be scrapped in favor of specific limits on incentives like the ones they proposed.

Commission response

The commission disagrees with Cities' proposed modifications to subsection (g). While the commission is sensitive to Cities' concern that costs be under control and associated savings be maximized to the extent possible, as stated in the commission's response to comments on subsection (d) above, the commission believes that these issues are adequately addressed in the rule, without these changes. The commission does not agree with TXU Energy's suggestion that, if adjustments to incentive payments are permitted, only increases in incentives should be permitted. The commission believes that the rule adequately allows the utilities to adjust their incentive payments as necessary to aid their achieving the energy efficiency goals. The utilities have significant experience in managing energy efficiency programs, and they should be able to recognize changes that would inhibit a program's success.

The commission does not agree with the recommendations of Texas ROSE and TLSC, Sierra Club, Public Citizen, Environmental Defense, and SEED regarding caps on incentive levels as percentages of avoided costs. The commission concludes that utilities should have the flexibility to establish incentive levels, subject to the avoided cost limit, in order to best achieve their energy efficiency goals. Different incentive levels may be appropriate in different areas of the state and at different time, and fixed limits in the rule would impede utilities' ability to adjust their programs to meet the statutory goals. The commission is adopting language similar to that proposed by EUMMOT to describe reasons for different incentive levels. The commission is not adopting the EUMMOT proposal that changes in incentive levels need not be publicized. These programs depend on energy efficiency service providers' participation, and the incentive levels are clearly a matter of some importance to the service providers. The publication requirement that is included in the rule is not onerous, but is one that should help keep the service providers engaged in the utility efficiency programs.

The commission disagrees with Texas ROSE and TLSC's recommendation to provide the cost of avoided transmission costs so that higher incentives can be allowed for renewable DSM measures and the highest efficiency end-use technologies that are not customarily installed under the standard offer programs. This issue is discussed in the commission's response to Preamble Question Two.

§25.181(h): Performance Bonus

EUMMOT suggested that an energy efficiency bonus awarded under this section not be included in the calculation of the utility's energy efficiency program expenditures.

Cities proposed modifying proposed subsection (h) of the proposed rule so that a utility can receive a bonus only if it exceeds its demand reduction goal "through the implementation of cost-effective energy efficiency measures that provide net economic savings to retail customers." Likewise, Texas ROSE and TLSC sought to modify this section by allowing utilities to "apply" for a performance bonus, and not simply providing that a utility be "awarded" a bonus if it exceeds its goal. They stated that PURA §39.905(b)(1) directs the commission to adopt rules to reward utilities that exceed the minimum goals established by PURA. In their view, a utility should have outstanding program results in order to be eligible for incentives. They defined a successful program as one that meets ninety percent of its stated energy efficiency goal.

Sierra Club and Reliant sought to limit those eligible for bonuses to utilities that keep administrative costs under ten percent of total program costs. The Sierra Club suggested in addition that, rather than require that a performance bonus be granted for utilities that exceed the limit as the current rule reads, the rule should permit such bonuses. The Sierra Club, Texas ROSE and TLSC proposed that at least eighty-five percent of the total demand reduction goal come from programs that save both demand and energy, so that the rule would promote more comprehensive programs. Public Citizen, Environmental Defense and SEED recommended that a utility not receive a bonus unless it exceeds its demand reduction goal and achieves at least eighty percent of its total demand savings from programs that save both demand and energy. The Sierra Club argued that a utility should not be eligible for a bonus, unless it meets at least 120% of its demand reduction goal with at least ten percent of its savings achieved through Renewable DSM Technology programs. Texas ROSE and TLSC urged that a utility should not be eligible for a bonus, unless it achieves at least five percent of its savings through Renewable DSM Technology programs.

Texas ROSE and TLSC asserted that to be eligible, the utility's programs should be very cost effective and administrative costs should not exceed ten percent of total program expenditures. In the interests of promoting renewable DSM, they stated that a utility should achieve at least five percent of its goal with renewable DSM measures. Public Citizen, Environmental Defense, and SEED proposed for a utility that meets at least 120% of its demand reduction goal with at least ten percent of its savings achieved through Renewable DSM Technology programs an additional ten percent bonus.

OPC articulated several problems with the proposed bonuses to utilities for exceeding their demand and energy savings' goals. OPC noted that the calculation appears to be straight-forward for determining growth in demand, but it does not provide any standards for calculating the demand reductions, which are to be based on an average of the utilities' last five years of annual peak demand growth. OPC specified that any calculation of demand savings for the programs authorized by this rule should not directly or indirectly include demand savings obtained from other programs. OPC recommended that bonuses be contingent upon proof of administrative efficiency and proof that all energy efficiency program goals established were significantly met. At the public hearing, OPC stated that, unless a utility achieves 110% of the goal, the utility should not be eligible for a performance bonus. Reliant proposed that a utility would not be eligible for a bonus unless it achieves at least 120% of its demand goal.

Efficiency Texas urged that a bonus be available that would be a reasonable, but not excessive, incentive payment for those utilities that exceed their legislative energy efficiency mandate in a cost-effective manner. It also noted that increasing energy efficiency should always be the first public policy program to pursue. Efficiency Texas further proposed that utilities be given timely cost recovery of their energy efficiency expenditures, as well as a financial incentive payment for exceeding the legislature's minimum energy efficiency goal. Efficiency Texas stated that HB 3693 made clear that utilities were to be given timely cost recovery and that a "bonus" should be given to those utilities that exceed the energy efficiency goals.

Commission response

The commission does not agree with Cities' proposed modification to subsection (h) that would provide that a utility could receive a bonus only if it exceeds its demand reduction goal through cost-effective measures providing a net economic savings to retail customers. As stated in response to comments on several sections in this rule, the commission believes that the structure of the rule, including its reporting and review processes, will ensure that utilities implement the programs in a cost-effective manner. The commission does not adopt the suggestion that the utility merely has a right to apply for a bonus, that is, that utilities that meet or exceed their goals "may" receive a bonus. The criteria for granting a bonus should be clear and predictable. The commission also believes that bonuses that result from the rule will be related to exceptional performance in the area of energy efficiency. The Cities' proposal is likely to make the determination of whether a utility qualifies for a bonus significantly more contentious, and would in the end not provide the inducement that is intended. The bonus structure is set up so that utilities that reach 100% or more of their goal receive a bonus. As is noted in connection with the Cities' comments, the bonuses are intended to reward exceptional performance in the area of energy efficiency, not result in a contentious contested case about whether a utility qualifies for a bonus. The commission believes that predictable incentives will provide a real inducement for exceptional performance.

The commission does not agree with the Texas ROSE and TLSC, and Sierra Club's proposal to limit bonuses to utilities that have kept administrative costs under ten percent of their total program costs. The proposed rule would have required that a utility meet cost limits prescribed in the rule, and the commission is amending this provision to explicitly refer to the caps in subsection (h), a ten percent cap on administrative costs and a ten percent cap on research and development. The commission does not agree with the Sierra Club, Public Citizen, Environmental Defense, SEED, and Texas ROSE and TLSC's suggestion to require a certain percentage of the total demand reduction goal come from programs saving both demand and energy, or that promote renewable DSM or that an additional bonus be provided for meeting a renewable DSM goal. The commission believes that this rule represents a higher emphasis on energy savings than existed in the prior version of the rule, but it also believes that the incentive structure should be relatively simple. Other commenters were strong proponents of demand response programs, and structuring the rule to provide additional emphasis on energy programs would be contrary to the interests of demand-response advocates. The rule emphasizes cost-effective energy efficiency programs, within broad guidelines, and includes reward mechanisms that are based on exceeding the specific goals in a cost-effective manner. The commission believes that the enactment of higher goals and authority for cost-recovery mechanisms and bonuses in HB 3693 reflects the conclusion by the legislature that energy efficiency programs are important today and that the programs that the utilities have operated have been quite successful. Based on this success, the commission concludes that details such as caps on incentives by rate class and multi-factor incentive programs are not appropriate.

The commission agrees with OPC that calculations of demand savings for the programs authorized by this rule should not directly or indirectly include demand savings obtained from other programs. With respect to Efficiency Texas's comments regarding bonus awards, the commission believes that the methodology for approving bonuses is consistent with the objectives of HB 3693.

The commission does not agree with OPC's comments that a utility should achieve 110% of its goal to receive a bonus or Reliant's suggestion that a utility must achieve at least 120% of its demand goal to qualify. The bonus structure is scaled, so that exceeding the goal by a small amount will result in a small bonus, while exceeding the goal by a large amount could lead to a large bonus, depending on cost effectiveness. The commission concludes that this structure will result in a clear emphasis among the utilities for meeting the goals, which is consistent with the legislature's decision to increase the demand goals in the statute.

Reliant proposed substituting "net of utility costs" for "net benefits realized in" in describing the calculation of a bonus for meeting the demand reduction goal. Texas ROSE and TLSC also recommended adding to subsection (h)(1) the following requirements: (1) the utility must document savings and other requirements through an independent review of its programs; (2) all of the programs offered by the utility must meet at least ninety percent of the goal for the program; (3) the utility must meet or exceed goals for achieving energy savings for goals for programs offered to hard-to-reach consumers; and, (4) there should be a cap on the performance bonus for a utility that exceeds its demand reduction goal. Reliant noted that although it does not fundamentally oppose the concept of a performance bonus for exceeding the goals at a cost equal to or better than the budgeted amount, the bonus established in paragraph (3) may result in a bonus payment that is much greater than what is intended. Reliant commented that a quick "back of the envelope" calculation indicated that the bonus could be very close to the same amount as the total program costs. Based upon calculations from, for example, CenterPoint's energy efficiency report filed April 2, 2007, it found that bonuses could be excessive. Reliant proposed, therefore, that the bonus be capped at no more than ten percent of the program costs, as noted above.

Commission response

The commission understands Reliant's concerns regarding the potential size of bonuses that might be awarded to over-achieving utilities. The historical achievements are not necessarily indicative of results that will be achieved with higher energy efficiency goals and lower levels of participation by industrial customers. The commission believes that it is likely that the net benefits will be lower in the future, as utilities obtain more of their savings from residential and commercial customers. Nevertheless, the commission concludes that it is appropriate to establish a cap that is based on the program costs, rather than one that is based on net benefits. For this reason, the commission is modifying the cap in subsection (h)(2) to limit bonuses to twenty percent of program costs. This modification will preclude the award of disproportionately high bonuses. The commission concludes that an independent review of program results is not necessary for the award of a bonus. The commission believes that such a prior review would impede the objectives of timely cost recovery and providing effective incentives for performing above expectations; in addition, it concludes that the commission has adequate authority to review reported program achievements, if necessary. The commission is not establishing a minimum ninety percent performance level for all of a utility's programs to qualify for a bonus. The utilities may need the latitude to adjust their programs if some are not as successful as expected. The more important point is that the utilities meet or exceed their goals. The commission concludes that requiring that the utility exceed its en-

ergy goal is also not necessary. The rule, as adopted, includes significant incentives for utilities to succeed in their energy goals, because the energy savings are a significant element of the net benefits calculation that is used in setting bonus amounts.

CenterPoint proposed that subsection (h)(2) be rewritten to exclude research and development (R&D) expenditures from program costs in calculating net benefits to avoid creating a disincentive for electric utilities to support R&D. ARM was additionally concerned that including R&D costs within the universe of administrative costs might result in decreased R&D expenditures, to the ultimate detriment of electric utility energy efficiency programs. ARM stated that this is particularly true if administrative costs are higher due to the new energy efficiency goals established in HB 3693 and if new types of administrative costs (*e.g.,* a third party advertiser/information clearinghouse) are borne by electric utilities. ARM noted that expenditures for R&D to formulate new and more efficient programs to reduce energy consumption, peak demand, and energy costs are essential to PURA §39.905. ARM stated that PURA §39.905(e) recognizes that such R&D expenditures can "foster continuous improvement and innovation in the application of energy efficiency technology and energy efficiency program design and implementation."

Texas ROSE and TLSC proposed that subsection (h)(2) permit the utility to receive twenty-five percent of the net benefits realized in meeting its demand reduction goal, that all utility costs be included in calculating net benefits, and that the customer classes responsible for the achievement of the net benefits receive seventy-five percent of the net benefits. Reliant noted that it is a misnomer to refer to the calculation in subsection (h)(2) as a "net benefits" calculation. Reliant noted that the current calculation of "net benefits" is total avoided costs minus all utility program costs. Reliant suggested that in reality the "net benefits" are the total avoided costs minus all utility program costs and the EESP's costs. Reliant stated the calculation in the rule does not reflect net benefits. Additionally, Texas ROSE and TLSC recommended language that entitles the utility to receive twenty-five percent of the net benefits and the customer classes responsible for achieving the savings and paying the costs of the programs seventy-five percent of the net benefits. They advocated that the amount of the benefit would be returned to the customer as a rate credit.

Commission response

The commission agrees with CenterPoint's proposal to exclude research and development expenditures from the calculation of the sum of program costs. This issue is also discussed below.

The commission does not agree with Texas ROSE and TLSC's proposal to include EESP costs in calculating net benefits and to require that the customer classes receive seventy-five percent of the net benefits. The commission believes that the bonus structure being adopted adequately but not excessively rewards utilities and provides them incentives to achieve their goals. This rule is being adopted to modify an energy efficiency program that the utilities administer in competitive markets, through energy efficiency service providers. The energy efficiency program has worked by providing incentives to EESPs, who in turn may provide information and incentives to customers to induce them to participate in the program. For most customer classes, the customers typically make some investment in more efficient appliances or in improving the performance of a home or other building, and often the customer's investment is significant. Requiring utilities to determine and take EESP or customer costs into account in calculating a bonus would be difficult, intrusive, and costly. The commission does not regulate the EESPs and does not believe that it is practical to obtain information from them concerning their costs, without adversely affecting their interest in this program. The program has been successful in motivating EESPs and customers to participate in it, and the mandate that these parties propose is more likely to undermine the program than promote additional participation.

Xcel expressed concern with the proposal that a bonus can only be awarded above 100% of the goal. Xcel stated that because these goals are a significant step, at least a partial performance bonus should be awarded. Xcel noted that in other states such as Minnesota, the bonus starts at ninety percent of the approved goal. Xcel noted that SPS appreciated that the commission developed a performance bonus that encourages utilities to exceed their legislative goals and, based on its experience in other jurisdictions, believes that the percent of net benefits is a good approach.

Commission response

The commission does not agree with Xcel's suggestion that the bonus should be awarded for performance of less than 100% of the goal. The bonus is meant to reward utilities that meet or exceed the goal and should only be awarded to those utilities that do so.

Cities proposed modifying subsection (h)(4) to permit a bonus only when the bonus plus program costs are lower than the total economic savings achieved by retail customers as a result of the energy efficiency program. Texas ROSE and TLSC suggested that the threshold for an additional bonus for savings from programs for hard-to-reach customers be increased from ten percent to twenty percent, consistent with an earlier staff proposal that included an additional incentive for doubling the percent of savings attributable to programs for hard-to-reach customers. In addition, OPC believed that an additional problem is that the proposed bonus cap of twenty percent (and an additional ten percent) is too high; it recommended that the bonus cap be set at five percent, with an opportunity for an additional five percent if the utility meets 150% of its demand reduction goal with at least fifteen percent of its demand reduction savings achieved through Hard-to-Reach programs.

Commission response

The commission concludes that the bonus structure adequately balances the societal objectives of the program and utility obligations, by providing rewards for meeting and exceeding the goals and obligations. The commission believes that the objective of the Cities' suggestion will be met. Because the bonus is calculated as a percentage of net benefits, the bonus plus program costs should be less than the net benefits in all cases. (The bonus is one percent of net benefits for each two percent of demand savings above the utility's goal, capped at twenty percent of program costs. Unless program costs are below avoided cost, there will be no net benefits on which to calculate a bonus.) The commission has modified the calculation of the cap that will reduce the possibility for very large incentive payments, but it believes that utilities should have the possibility for earning a significant bonus for exceptional performance, and that some of the changes that have been proposed would undermine this possibility.

CenterPoint proposed a new subsection (h)(6) as follows: "A bonus earned under this section shall not be included in the utility's revenues or net income for the purpose of establishing a

utility's rates or for any required filing of earnings by the utility." CenterPoint commented that it is conceivable that a party in a future utility rate case will argue that an electric utility's energy efficiency performance bonus should be included in a test year's revenues. CenterPoint stated this would effectively negate the bonus earned and frustrate the intent of the legislature in enacting PURA §39.905(b)(2) directing the commission to adopt rules to reward utilities for exceeding the minimum energy efficiency goals. CenterPoint stated, in fact, that reflecting the bonus in net income for ratemaking purposes could penalize the electric utility if it was unable to exceed its demand reduction goals at the same or higher percentage levels in future years.

Commission response

The commission agrees with CenterPoint that, for the purpose of ratemaking and rate-setting, any performance bonus earned by the utility should not count towards its test year's revenues or for any required filing of earnings by the utility at the commission.

Texas ROSE and TLSC supported the idea that rewards should be accompanied by a corresponding penalty for poor performance. They supported adding provisions to the adopted rule that would penalize a utility that performs poorly, because such a system would be more transparent, direct, and efficient than the standard administrative enforcement process.

Commission response

The commission does not agree with Texas ROSE and TLSC's suggestion that specifically setting forth a bonus structure necessarily means that there should be a corresponding section establishing for penalties solely for poor performance. The commission believes that subsection (u) of the new rule, which provides for a discretionary administrative penalty, suffices to ensure that utilities be held accountable for poor or under-performance. The commission notes that PURA §39.905(g) permits the commission to provide a good cause exception to a utility's liability for penalties, under certain circumstances. The provisions that the commission is adopting are consistent with this approach, which implies that the commission must consider the circumstances for any utility that fails to meet its goal, rather than applying a formulaic approach.

§25.181(i): Program Expenditures

Cities proposed adding language to subsection §25.181(i) so that the costs of administration is "subject to a prudence review." Texas ROSE and TLSC commented that the cost of administration should not exceed ten percent of the total program "expenditures" without regard to the number of customers the utility serves. They further commented that many of the more-burdensome administrative costs are being lessened by the proposed rule and nothing justifies a higher administrative cost to the utility. In addition, Texas ROSE and TLSC stated that if a utility's administrative costs exceed ten percent of total program costs the utility should be ineligible for a performance incentive bonus. ARM and OPC agreed that the cost of administration should not exceed ten percent.

The Sierra Club stated that HB 3693 does increase the requirements on utilities such that it requires informational programs and advertisements that were not required previously. Like Texas ROSE and TLSC, the Sierra Club suggested that, because this rule increases substantially the provision for administrative costs, only those utilities that keep administrative costs under ten percent of total program costs be eligible for performance bonuses. The Sierra Club suggested, in addition, that the utility be required to pay the costs of an independent measurement verification evaluator as was previously required. The Sierra Club suggested that this evaluation could help the commission make sure that administrative costs were kept as low as possible. Furthermore, the Sierra Club concluded that if the commission considers having a third party contract to promote information and advertising of energy efficiency programs throughout Texas, the rule should specify that administrative costs would fund this third-party contract.

Commission response

The commission does not agree with Cities' proposed "prudence review" language, noting that the rule provides that the utilities will annually report their programs results and that the EECRF would be adjusted to minimize over- and under-recoveries. The commission believes that the reviews of utility programs set forth in the rule, including cost of administration, are sufficient and notes that the commission has added subsection (f)(13) to the rule, which requires a reconciliation of costs recovered through a utility's EECRF at least every three years.

The commission agrees with OPC, ARM, the Sierra Club, Texas ROSE and TLSC's argument that administrative costs should be set at ten percent of the program cost budget. However, the commission is adopting a separate ten percent limit on research and development costs. The commission expects that administrative costs and research and development costs may be higher than in the past, because utilities will have to rely on programs for residential and commercial customers to a greater extent than they have in the past to meet their energy efficiency goals. In addition, it is likely that building codes and appliance standards will play a bigger role in inducing consumers of electricity to improve the efficiency of their appliances, homes and other buildings. In this environment, the utilities are likely to have higher administrative and program development costs, because the remaining efficiency potential will be more difficult to reach, and innovative programs will have to be developed and implemented.

For subsection (i)(1)(B), TXU Energy proposed that the provisions relating to informational programs to improve customer awareness of energy efficiency programs and measures be limited to electric utilities outside of ERCOT. TXU Energy stated that proposed §25.181(i)(1)(B) would allow utilities to recover costs incurred by a utility in "providing informational programs to improve customer awareness of energy efficiency programs and measures." However, PURA §39.9025(a)(5) requires REPs in the ERCOT region and only the utilities outside of ERCOT to "provide customers with energy efficiency educational materials." TXU Energy suggested that perhaps the simplest way to conform the language of the rule to the requirement of the statute would be to limit the application of §25.181(i)(l)(B) to "electric utilities outside of ERCOT." TXU Energy suggested alternatively, the rule could perhaps be clarified to avoid overlap with the REPs' statutory responsibility. TXU Energy suggested, however, that if the commission preferred to allow utilities within ERCOT to supplement the duty imposed on REPs by the statute, then the associated costs that are deemed necessary and reasonable be expressly limited to those incurred where the commission finds that the REPs cannot or have not provided the information provided by the utility within ERCOT. ARM recommended the deletion of proposed subsection (i)(1)(B) for the same reasons and noted that the proposed subsection (i)(1)(A) is sufficient to capture the appropriate subcategory of administrative costs relating to an electric utility's provision and dissemination of energy efficiency information.

Reliant argued that the subsection (i)(1)(B) requirement is an unnecessary new expense for utilities, and mass market customers do not have direct access to utility energy efficiency programs, but must go through EESPs to access the programs. Reliant stated that these entities are more suited to providing information, and as a practical mater will have to do so in order to get customers to participate in whatever programs the EESPs offer. Reliant noted that industrial customers are sophisticated enough to obtain information about the programs without the utility needing to establish a new requirement for outreach.

Commission response

The commission agrees with TXU Energy, ARM and Reliant's concerns with the confusion over providing informational efforts by utilities to customers, and agrees that subsection (i)(1)(B) should be modified to reflect that providing information to customers is an appropriate administrative cost only for utilities outside of ERCOT.

EUMMOT proposed deleting subsection (i)(1)(C), stating that this subsection does not serve to foster and promote innovation, but rather to diminish it, based on its limited access to necessary funding. EUMMOT also reasoned that the funding structure as outlined in the proposed rule runs contrary to that proposed in HB 3693 and, in effect, undercuts the intent of the legislature. EUMMOT stated since administrative and management activities, which have been deemed by the commission to be reasonable and necessary, are truly essential to the operation of the programs. In its view, the utility's ability to sponsor the research and development that the legislature envisioned would be extremely limited under the proposed rule. Good Company, ARM and CCET agreed on the deletion. Good Company recommended that R&D expenses be included in a separate category, apart from administrative costs, and capped at the legislative mandated ten percent, to be used specifically for energy efficiency R&D. In addition, these commenters stated that to include these expenses in the same budget as administrators' salaries seems likely to undermine the legislature's intent, as utility management will be tempted to pay for current overhead at the expense of developing new efficiency measures. Good Company noted that HB 3693 allows the utilities to use up to ten percent of their efficiency program budgets on R&D, and does not address the administrative budget.

ARM recommended that proposed subsection (i) be revised to employ separate "buckets" for administrative and R&D costs, rather than lump those costs together in the same "bucket." ARM argued that both of these cost categories should be individually capped. ARM recommended the existing ten percent cap on administrative costs in the current version of P.U.C. Substantive Rule §25.181(i) should remain for that category of expenses, regardless of the size of the electric utility. ARM noted that the cap on R&D costs should track the wording of PURA §39.905(e): the costs of conducting R&D activities may not exceed ten percent of the greater of: (A) the amount the commission approved for energy efficiency programs in the electric utility's most recent full rate proceeding; or (B) the commission-approved expenditures by the electric utility for energy efficiency in the previous year.

Commission response

The commission agrees with EUMMOT, Good Company, ARM, CenterPoint, and CCET's comments that research and development costs should be separated from administrative costs. The commission is modifying this provision to adopt a cap on administrative costs that reflects the separate limit on R&D costs in §39.905(e). The limits that are being adopted are ten percent for administrative costs and ten percent for R&D.

Public Citizen, Environmental Defense, SEED Coalition suggested adding to the list of administrative functions "the funding of independent verification of program results ordered by the commission."

Commission response

The commission does not agree with the proposal of Public Citizen, Environmental Defense and SEED. The commission is not committed to requiring an independent verification of the utilities' reported program results, but in connection with the granting of additional flexibility in the management of energy efficiency programs it may be reasonable to periodically conduct third-party reviews, which would be at the utilities' expense. The commission believes that it has the latitude to require such a review, whether it is specified in the rule or not.

Reliant suggested that subsection (i)(3) should permit a utility to establish funding set asides or other program rules to foster participation in energy efficiency programs by retail electric providers. Good Company largely agreed, but would include municipalities and other governmental entities as potential targets for set-asides. ARM agreed with Good Company. Reliant noted, in contrast, that the statute specifically supports the facilitation of participation by REPs, whereas there is no comparable statutory language fostering participation by municipalities and other governmental entities. Reliant suggested, as an alternative, that the commission could delete the entire paragraph because one interpretation is that the utilities have the latitude implicitly to establish such set asides for REPs pursuant to PURA §39.905(a)(4). ARM agreed with the deletion of the proposed subsection in its entirety if REPs are not included within its scope, noting that PURA §39.905(a)(4) requires an electric utility to use its "best efforts" to encourage and facilitate REP involvement in the delivery of its energy efficiency and demand response programs.

Public Citizen, *et al.,* proposed the creation of a special standard offer program to allow cities and counties to do retrofit programs for homes and other buildings. This would result in more energy efficiency in hard to reach areas, including low income communities. The American Institute of Architects found that existing homes and businesses can cut fifty percent of their energy use through retrofits. It also advocated for programs for cities to retrofit their own facilities.

Commission response

The commission disagrees with Reliant, ARM and Good Company's suggested modification to subsection (i)(3) to include a "set-aside" to foster REP participation in the energy efficiency programs. The commission notes that utilities are required to use best efforts to facilitate REP involvement, and this statutory directive is repeated in subsection (r) of the rule. The commission concludes that the utilities have broad latitude concerning their best efforts, and that there is not a need for an additional provision for "set-asides" to foster REP involvement in the program. Set asides could tie up program funds and impede a utility's efforts to meet its goals, if REPs do not actively participate in the program.

The commission does not agree with Public Citizen's recommendation to create special standard offer programs to allow cities and counties to retrofit homes and other buildings. Subsection (i)(3) permits utilities to use set-asides to foster participation in

energy efficiency programs by municipalities and other government entities, which gives the utilities flexibility to adopt the programs they believe will be effective in reaching their energy efficiency goals, consistent with other program requirements.

TXU Energy proposed modifying subsection (i)(4) to require that copies of the forms, procedures, deemed savings estimates and program templates also be provided to EESPs and retail electric providers. In addition, TXU Energy sought to add a provision directing electric utilities to work collaboratively with EESPs and retail electric providers regarding any changes to these program documents. EUMMOT proposed removing the phrase "program templates." EUMMOT stated that with this change, program templates would still be included in each utility's annual Energy Efficiency Plan, but a set of commission-approved templates would no longer be maintained by the commission. EUMMOT stated that, as with any other component of a Plan, it could be reviewed by the public. It also noted that the proposed §25.181(n) would also provide a forum for public input into a template.

Commission response

The commission is adopting a provision that would direct utilities to provide relevant documents to REPs and EESPs and to work collaboratively with them when they are changing these documents, to the extent that such changes are not considered in the Energy Efficiency Implementation Project described in subsection (q). The commission does not agree with EUMMOT's proposal to remove the phrase "program template." The commission recognizes that the utilities will normally provide program templates in their annual report that is filed with the commission. The requirement under subsection (i)(4) is still appropriate, because it would address any changes in program documents during the course of a program year and require the use of standardized forms, procedures and program templates.

§25.181(j): Standard offer programs

Good Company and ARM, in commenting on subsection (j), stated that utilities should cooperate with REPs to foster their involvement in standard offer programs.

Commission response

PURA §39.905(a)(4) states that each electric utility in ERCOT shall use its best efforts to encourage and facilitate the involvement of the region's retail electric providers in the delivery of efficiency programs, which includes standard offer programs, and this statutory directive is repeated in subsection (r) of the rule. The commission concludes that an additional reference to this obligation in subsection (j) would be redundant.

§25.181(k): Market transformation programs

TXU Energy proposed that the last sentence of subsection (k) be modified to direct the utilities to assist in the development of programs for REPs' customers, and, where possible, either leverage existing industry-recognized programs or utilize new advanced technologies that have the potential to reduce demand and/or energy consumption in Texas. They noted that REPs can offer new technology to better serve their customers and give them the products they demand. In addition, TXU Energy stated the legislature's introduction of advanced metering should add significant benefit to the Texas market and allow REPs to provide these services to their customers. TXU Energy suggested a clarification that the programs should be described as programs that may reduce demand and/or energy consumption, since demand response is an example of a program that may reduce demand but not necessarily energy consumption. TXU suggested that these types of programs can greatly advance the overall goals of reducing demand growth, and they should not be excluded. TXU Energy stated that in order to meet the significant energy efficiency mandates established by the legislature, the statute requires the commission to establish a procedure for reviewing and evaluating market-transformation program options. TXU Energy suggested that in evaluating program options, the commission may consider the ability of a program option to reduce costs to customers through reduced demand, energy savings, and relief of congestion. TXU Energy stated that utilities should be able to choose to implement any program option approved by the commission after its evaluation in order to satisfy the goal.

TXU Energy stated that all of these program alternatives listed in the statute have potential benefits for energy efficiency, including both energy and peak demand savings. TXU Energy stated that it understands that in order for these or any other program ideas to be acceptable to the commission and utilities that providers will need to demonstrate that their proposal can measure and verify savings. TXU Energy noted one hurdle, however, will be determining how the energy savings will be measured. TXU Energy noted that REPs and EESPs should have a good understanding from the commission and the utilities what will be expected and what will be needed to demonstrate savings using these options. TXU Energy stated it is important that the accepted measurement and verification protocols be sufficiently broad and flexible to account for demand and energy savings that may be available through non-traditional programs.

Texas ROSE and TLSC commented that the phrase "compliance with existing building codes and equipment efficiency standards" in subsection (k) should be deleted. Public Citizen, Environmental Defense and SEED sought to have subsection (k) explicitly permit market transformation programs that are designed to improve compliance with, or enforcement of, newly adopted state or local building energy codes for a transition period defined by a baseline study or by specific agreement with the adopting authority or to increase participation in standard offer programs. They also urged that this subsection provide that utilities should cooperate with the REPs, consider statewide administration where appropriate and, where possible, leverage existing industry-recognized programs that have the potential to reduce demand and energy consumption in Texas. They also suggested that the subsection should incorporate the recommendation of the Summit Blue Report to measure the impact of market transformation programs over a multi-year period, with multi-year targets, and allow incentives to be evaluated over the market transformation period, rather than by single year's results. In their view, achieving the available potential demand and energy reduction will require strategic market interventions on several fronts and a degree of mutual support between public policies affecting efficiency. For this reason, they recommended the addition of specific language intended to provide flexibility for utility programs to support adoption and implementation of state and local advanced building energy codes and efficiency standards. They requested that the commission approve and encourage net zero energy buildings market transformation program options. HB 3693 specifically includes, and the proposed rule should permit such programs. They requested that the procedures established by the commission for evaluating market transformation programs consider environmental and reliability benefits as well as reduced costs to customers through reduced demand, energy savings and relief of congestion. Also, they requested the commission to consider reviews or workshops of best practices and program ideas on an annual or biennial basis.

Commission response

The commission does not agree with TXU Energy's suggestion to modify subsection (k) to include language regarding utilities' cooperation with REPs to "utilize new advanced technologies." The commission concludes that advanced technologies and "existing industry-recognized programs" both have a role in energy efficiency, and that utilities will have appropriate latitude to select programs that give them sufficient certainty of success in achieving their savings goals and also foster innovation through advanced technologies, recognizing that not all new technologies will immediately live up to their promise. With respect to TXU Energy's comments that it may be difficult to measure and verify savings in certain, newer or unproven technologies, the utilities have some flexibility in measurement and verification of savings, but this flexibility must be exercised with a recognition that customers are paying for the programs that are adopted under this section. The measurement and verifications procedures that the utilities use must produce an honest assessment of the savings resulting from a program.

The commission does not agree with Texas ROSE and TLSC's request to delete the phrase "compliance with existing building codes and equipment efficiency standards." While new building codes and appliance standards are being adopted that will require higher energy efficiency performance, there may be difficulties in enforcing these codes and standards, and the commission believes the energy efficiency program may have a role in helping to ensure that the promise of the codes and standards is achieved.

Finally, the commission agrees with some of Public Citizen, Environmental Defense and SEED's suggested additions to subsection (k) regarding market transformation programs. The commission believes that it is reasonable to clarify in adopting this rule that market transformation programs encompassing a multi-year period are appropriate and may demonstrate cost-effectiveness over a period longer than one year, but it is not necessary to refer, in this subsection, to programs developed with REPs. An encouragement for programs involving REPs is provided in subsection (r). In addition, the commission does not agree with Public Citizen, Environmental Defense and SEED's suggestion regarding periodic review or workshop on an annual or biennial basis. The rule continues the Energy Efficiency Implementation Group that has played a role in implementing the prior version of this section, and the commission has the latitude to schedule program reviews or workshops, as needed and as resources permit.

§25.181(l): Requirements for standard offer and market transformation programs

TXU Energy perceived potential ambiguity in proposed §25.181(l)(1)(C). TXU Energy noted that this paragraph appears to be intended to prohibit a utility from tying its standard offer or market transformation program to the customer's purchase of any other product or service from the utility or the utility's competitive affiliate. TXU Energy supported this goal, which is probably already achieved through other laws, including the Code of Conduct. TXU Energy proposed that programs shall not permit the provision of any product, service, pricing benefit, or alternative terms or conditions of the utility's standard offer and market transformation programs to be conditioned upon the purchase of any other good or service from the utility or taking retail electric service from the utility's competitive affiliate, except that only customers taking transmission and distribution services from a utility can participate in its energy efficiency programs. TXU Energy also proposed that standard offer and market transformation programs must include incentives sufficient for retail electric providers and competitive energy service providers to acquire the targeted additional cost-effective energy efficiency for residential and commercial customers.

Texas ROSE and TLSC proposed that standard offer and market transformation programs shall offer, at a minimum, ten years of benefit to the customer.

EUMMOT proposed that a utility may offer higher incentive levels for projects undertaken in areas of its service area which have traditionally been underserved by the utility's energy efficiency programs. Reliant proposed that utilities may offer higher incentive payments for programs that result in incentive payments being passed through to end-use customers.

Commission response

The commission disagrees with TXU Energy that subsection (l)(1)(C) is ambiguous and with TXU Energy's proposed clarification regarding the sufficiency of incentives. The rule that is being adopted is based on the idea that utilities have considerable discretion in adopting programs and setting incentive levels to meet their goals, and it includes the prospect of bonuses if they meet them and penalties if they do not. Providing additional rule provisions on the sufficiency of incentives is not necessary. The commission agrees, however, that the provisions on program eligibility should be clarified, along the lines suggested by TXU Energy.

The commission does not agree with Texas ROSE and TLSC that standard offer and market transformation programs must have a minimum of ten years benefit to the customer. The commission believes that certain programs, such as an air conditioning tune-up program, which has far less than a ten-year measure life, may still be viable alternatives. Therefore, establishing one uniform minimum would not, overall, help utilities meet their statutory obligations or ensure the energy efficiency sought in this rule is achieved.

The commission concludes that EUMMOT's proposal that utilities should be permitted to offer higher incentive levels for projects undertaken in underserved areas is not necessary. The utilities' latitude with respect to incentives would permit them to use higher incentives for underserved areas, subject to the cost-effectiveness standard. The commission disagrees with Reliant that higher incentive payments should be required for programs that result in incentive payments being passed on to end-use customers. The statute requires that the "value" of the incentive be passed on to the customer, not necessarily the actual incentive payment itself. Customers will benefit more by energy efficiency programs and society will benefit more in areas such as emissions reductions if as much program value as possible goes to supporting energy efficiency measures that result in increases in customers' energy efficiency. Customers obtain value because their demand and energy consumption is reduced through the energy efficiency measures. Incentives may play a role in inducing EESPs and customers to participate in a program, but the primary objective of these programs is to reduce demand and energy consumption, which is where programs resources should be focused.

Texas ROSE and TLSC stated that the requirements for standard offer programs have been amended to assert the importance of passing the value of incentives on to customers. Texas ROSE and TLSC commented that the proposed rule mandates that the EESP identify peak demand and energy savings, but there is no

mandate for the EESPs to pass on any incentives paid by the utility. Reliant, Texas ROSE and TLSC recommended to reinforce the importance of mandating the reporting of this important program element by including in the rule a requirement that the EESP explain how the value of the incentive is being passed on to the consumer, to comply with PURA §39.905(b)(5). Texas ROSE and TLSC commented this requirement to have the EESP inform the utility of how the customer will benefit from the incentives works hand-in-hand with other provisions that they asked the commission to add to the rules to assure end-use customers benefit from the programs. Reliant urged the commission to strengthen the rule provisions that relate to the statutory requirement "ensuring the program rules encourage the value of the incentives to be passed on to the end use customer." Reliant and TXU Energy suggested amending the reporting requirements to require the utilities report to include a description of what the utility is doing to encourage the value of the incentives to be passed on to the end use customer.

Texas ROSE and TLSC recommended under subsection (l)(2)(B) that utilities may not pay incentives for a customer to switch from gas to electricity. They stated that the current rule prohibits the payment of any incentives for a project that would switch the energy source from gas to electricity. In addition, they noted that the proposed rule would allow a switch from gas to electricity in connection with the installation of high efficiency combined heating and air conditioning systems, which they opposed for a number of reasons. First, the exception allows gas end-use equipment to be replaced by equipment that operates using electricity. They stated that under PURA §39.905(a) the programs offered should allow each customer to reduce energy consumption, peak demand or energy costs, and that allowing gas end-use equipment to be replaced with electric equipment violates the statute by increasing electricity use. Moreover, they commented that allowing a switch from gas to electric is a violation of the purpose of PURA §39.905, which requires the commission to establish a procedure for reviewing and evaluating program options, and that utilities may choose to implement any program option approved by the commission after its evaluation. Texas ROSE and TLSC concluded that a program paying incentives for the customer to switch from gas to electric when installing high efficiency combined heating and air conditioning systems has not been reviewed, evaluated and approved by the commission. CenterPoint proposed that subsection (1)(3) be rewritten to state a market transformation program shall be neutral with respect to fuel.

Cities proposed modifying subsection (l)(2)(C) to require that all projects result in a reduction in purchased energy consumption, or peak demand, and a reduction in energy costs for the end-use customer. TXU Energy proposed that EESPs be required to identify peak demand and/or energy savings for each project in the proposals they submit to the utility.

EUMMOT proposed removing "not to exceed five years" from the market transformation design requirements. EUMMOT stated that §25.181(1)(4) appears to be designed to limit the life of a market transformation program to five years. EUMMOT noted the period of time that may be required in order to transform a market may be longer for certain markets. EUMMOT stated for example, the United States Environmental Protection Agency keeps raising the bar on the Energy Star New Homes program in order to promote higher levels of energy efficiency as the housing market changes and building construction practices improve. EUMMOT noted that there will always be opportunities to build more energy efficient homes, and this same program could be used in future years to promote "zero energy homes," green building, or a variety of other more-ambitious efficiency goals. EUMMOT suggested for these reasons deleting the phrase "not to exceed five years."

SEED Coalition proposed creation of a market transformation program for net zero energy homes, citing the actions of the American Institute of Architects, the U.S. Conference of Mayors and the National League of Cities in adopting a goal of having all new homes be net zero energy capable by 2030, and noting that the City of Austin plans to meet this goal by 2015. Public Citizen concluded that houses would become so efficient that their energy needs could be met with onsite renewable generation. In order to meet the net zero energy homes goal statewide, incentives should be made available to develop new energy efficiency and onsite renewable technologies, which would assure that the necessary equipment, personnel and distribution networks are in place. OPC asserted that a core set of energy efficiency programs should be required and include at the very least a residential customer energy rebate. OPC cited Austin Energy as a positive example of a successful energy rebate program, especially rebates for the replacement of customers' appliances with more efficient appliances, as one of the most reasonable approaches to meeting energy efficiency goals.

Commission response

The commission does not agree with Reliant, Texas ROSE and TLSC's comments that the rule should require EESPs to report the extent to which they pass on any incentives paid by the utility to customers. The commission notes that the statute requires that the commission provide oversight to encourage that the value of incentives be passed on to the end-use customer, and the rule is consistent with the statute. The standard offer programs are competitive programs that are implemented through the activities of EESPs and REPs, and these entities are subject to minimal regulation by the commission. Additional reporting requirements would be inconsistent with this competitive approach. Such reporting might also require the disclosure of important, competitively-sensitive elements of the business relationship between an EESP and its customers that would make EESPs less willing to participate in the programs under this section, resulting in fewer options for customers and potential damage to the program. Finally, as is noted above, the commission concludes that resources are better employed in increasing customers' energy efficiency, and that it does not make sense to redirect program resources to providing incentives to customers.

The commission also disagrees with OPC, Texas ROSE and TLSC's suggestion to modify subsection (l)(2)(B) so that utilities may not pay incentives for a customer to switch from gas to electric end uses. The statute does not prohibit this practice, and the commission believes that the rule should permit utilities to use whatever methods that can be quantified and verified in order to meet their energy efficiency goals. Efficient electric heating may be particularly appropriate, environmentally-beneficial measure in areas that do not meet or are on the verge of not meeting national air-quality standards for ozone.

The commission disagrees with Cities' proposed modification of subsection (l)(2)(C) to require that customers have a choice of and access to projects resulting in a reduction of energy consumption, peak demand "and" energy costs. PURA §39.905(a)(2) clearly states that customers should have access to and a choice of projects that result in reduced energy consumption, peak demand "or" energy costs, and both demand and energy savings have a value.

The commission disagrees with CenterPoint's suggestion that market transformation programs be neutral with respect to fuel, noting that the statute only requires that standard offer programs be fuel-neutral. There may be market transformation programs that could be offered that would not meet this criterion, and the commission concludes that it is preferable not to preclude the adoption of such a program without considering the specifics of the program. The commission agrees with EUMMOT's proposal to remove "not to exceed five years" from the market transformation design requirements, for the reasons expressed in its comments.

The commission does not agree with the SEED Coalition's proposal to create a market transformation program for net zero energy homes. The commission does not disagree that net zero energy homes may be an important resource, however. In particular, PURA §39.905(d)(10) states that net zero energy homes may constitute an option for utilities in achieving their goal under subsection (a). The goals that other entities have adopted for zero energy homes, as described in the SEED comments, are long-term goals, while the utility programs under this section are expected to yield results in the near term. The commission concludes that this topic merits further discussion outside of the context of this rulemaking proceeding, to determine how it may fit into the utility programs under this section. The commission has a separate proceeding under way related to interconnection standards for small generation units and net metering. Modifications of rules in these areas will be important in developing a net zero energy home program, and the commission concludes that the rules related to interconnection and net metering should be adopted before the commission takes any further action with respect to a net zero energy home program.

The commission disagrees with OPC that a core set of programs should be required. The utilities have successfully implemented the statute, using a model in which they and EESPs have considerable latitude to develop programs in order to achieve the program goals. The utilities and EESPs have a responsibility for program selection, and the commission does not believe that, with its limited resources, it can do a better job. The Austin Energy rebate program that OPC discussed involves direct utility contacts with customers, something that is inconsistent with the standard offer concept and the role of utilities under the statute and this rule. In connection with the TXU Energy suggestion that EESP should be required to provide information on the expected savings for each program, the commission concludes that such a requirement is not necessary for this rule. The utilities have the incentive to operate their programs to cost-effectively achieve the goals of the energy efficiency program, and they can require EESP to provide the information they need to select the EESPs that will best contribute to doing so.

Reliant expressed the view that there is a significant problem with the standard offer programs being granted on a first-come, first-served basis, namely, that EESPs offering low value programs who simply are more experienced with the process of securing funds may squeeze out other projects that may have greater merit. Reliant believed this problem should be tackled head on, and the best way is to require that utilities conduct competitive auctions. Reliant proposed specifically, that utilities be required to conduct a reverse auction for each standard offer program. Reliant suggested that such auctions could be implemented without great expense by the utilities, and that the benefits to the continued development of the energy efficiency market would outweigh the costs of developing an auction process. Reliant stated in a reverse auction, for a specified amount of demand savings, potential providers would bid to provide the savings at the lowest price. Reliant stated the utility would then select the lowest priced bids, moving up the stack until the auction goal is reached. Texas ROSE and TLSC also expressed the view that the rule would be improved by requiring competitive solicitations for market transformation programs. Sierra Club and Public Citizen, Environmental Defense and SEED also supported the use of a competitive solicitation process. Texas ROSE and TLSC recommended a competitive solicitation process in which every TDU issued an RFP once a year to ask for proposals for market transformation programs.

Commission response

The commission does not agree with Reliant's suggestion to require that utilities conduct a reverse auction for each standard offer program or with Sierra Club, Public Citizen, Environmental Defense, SEED, Texas ROSE, and TLSC's recommendation for a competitive solicitation process for market transformation programs. The commission believes that the proposed auction is inconsistent with the standard offer concept. While such an approach could be used for market transformation programs, the commission believes that such a significant change in the selection process should not be adopted without an opportunity for full comment on it by all of the parties. That opportunity did not arise in this rulemaking proceeding. In addition, one of the other goals of the energy efficiency program is to develop a network of companies that have expertise in energy efficiency and can provide assistance to customers who wish to improve the efficiency of their homes and businesses, regardless of the availability of programs under this section. The commission is not convinced that an auction process would contribute to the development of a strong EESP community throughout the state. Accordingly, the commission does not adopt the recommendation of these parties for a competitive selection process.

CenterPoint, Texas ROSE and TLSC urged deleting combined heat and power technologies as an allowable measure under subsection (l)(1)(E). CenterPoint stated that this paragraph of the proposed rule would include renewable DSM and combined heat and power technologies (CHP) as potential elements of standard offer and market transformation programs. CenterPoint noted that the inclusion of combined heat and power technologies (or, in other words, cogeneration) is contrary to the purpose of the rule and the underlying legislation, which is to reduce the growth in electric demand and thereby reduce the need for additional generation. CenterPoint stated that regardless of whether CHP has benefits or needs to be encouraged, it is inappropriate for electric utilities to provide incentives and promote one form of electric power generation over others given the electric utilities' role in the competitive market.

Texas ROSE and TLSC stated that the current rule is correct in prohibiting incentives for power production technologies. Texas ROSE and TLSC commented that under the current rule, CHP would be ineligible to receive incentives because it produces power. Texas ROSE and TLSC recommended a requirement for all technologies to be reviewed by the commission prior to implementation by the utilities. Texas ROSE and TLSC expressed concern that despite the fact that the commission has conducted no evaluation or study of CHP technology, the proposed §25.181(l)(1)(E) allows utilities to permit the use of CHP technologies in the program. Texas ROSE and TLSC stated that allowing CHP would violate PURA, and this provision should be deleted from the proposed rule.

Good Company also opposed allowing CHP technologies to be included as measures in standard offer and market transformation programs. Good Company noted that this section does not comply with PURA §39.912, which requires that the commission study CHP to determine "how combined heating and power technology can be implemented in this state to meet energy efficiency goals." Good Company believed it would be premature to include CHP in efficiency programs before CHP technology is further delineated by the commission, or the commission determines the means with which CHP can be implemented to meet program goals. EUMMOT expressed the view that CHP projects are not end-use energy efficiency, and CHP projects should not be permitted to receive energy efficiency incentives at all. EUMMOT proposed that CHP projects should either not be considered eligible or should have constraints placed on their eligibility, such as prohibiting them from making exports to the utility grid, a ten-megawatt size limit, or other restrictions.

EUMMOT noted that the commission's present energy efficiency rules do not promote CHP, unless a renewable energy source is involved. EUMMOT stated cogeneration really is not a "demand side" energy efficiency measure and might best be promoted through other programs or policies of the commission. EUMMOT stated that the promotion of CHP through energy efficiency programs also places the non-ERCOT bundled or vertically integrated utilities in an uncomfortable position of potentially subsidizing generation projects against which the utility might compete in wholesale generation markets. EUMMOT commented that their bigger concerns are practical ones. CHP projects can be enormous in size (*e.g.,* the facilities owned and operated by Oxy and Dow in ERCOT) and could take significant program incentive funds away from other demand-side efficiency projects. EUMMOT acknowledged that they understand that the proponents of this language are really hoping to promote medium-scale CHP projects in commercial and institutional facilities, but the lack of any constraints in the rule could open the door for large industrial-scale CHP projects as well.

ClimateMaster felt that the revised efficiency rule language, which provides that energy efficiency programs shall be neutral with respect to specific technologies, equipment or fuels, is appropriate and provides the necessary clarification that will remove what was a barrier to the widespread acceptance of this highly important technology. ClimateMaster noted that by clearly stating that utilities may not pay incentives for a customer to switch from gas appliances to electric appliances except in connection with the installation of high-efficiency combined heating and air conditioning systems, the commission would ensure that informed consumers are not precluded from participating in efficiency programs. ClimateMaster stated that this revised language opens the door to an unrestricted analysis of all available technologies to maximum energy savings, regardless of the type of fuel used.

TXCHPI recommended, under §25.181(l)(1)(E), that the placement of the two types of technologies that appear in the sentence should be transposed so that "combined heat and power technologies" precedes "renewable DSM technologies." TXCHPI noted that Texas leads the United States in CHP applications; nearly one quarter (twenty-three percent) of all CHP generation capacity in 2005 was located in Texas. TXCHPI said that CHP technologies generate electrical and thermal energy in a single, integrated system close to the point of customer energy demand. TXCHPI stated that CHP technologies and systems are well understood, and have been in use since the first days of U.S. commercial power production. TXCHPI stated that heat is a by-product of electric generation and is typically wasted; in fact, cooling towers and ponds lower the efficiency and increase costs at most large power plants in the U.S. Cooling towers and ponds are required to dispose of "waste" heat, which is not useable because the large power plants are located far from customers. TXCHPI stated that energy consumers use boilers and other devices to make heat (hot water and steam) when and where they need it, with natural gas the most common fuel choice in Texas. TXCHPI stated the most obvious benefit of a CHP system is its efficient use of the energy released when the fuel is burned, and the average thermal efficiency of a typical simple cycle power plant is about thirty-three percent, while combined cycle combustion turbines achieve efficiencies of fifty-five percent. TXCHPI noted the capture and use of waste heat allows CHP systems to achieve efficiencies of sixty percent to ninety percent, and capturing waste heat requires a capital investment that is returned in energy cost savings over several years.

TXCHPI noted over seventy-five percent of the CHP capacity in Texas is in industrial applications of 100 megawatts or greater, that is, in utility scale industrial applications. According to a study conducted by the Gulf Coast CHP Application Center, there is an additional 7,400 megawatts of potential in industrial settings and 6,200 megawatts of potential in commercial and institutional settings (hotels, hospitals, colleges, schools, office buildings, prisons, nursing homes). TXCHPI stated that seventy-five percent of the potential is in applications of 20 megawatts of less, divided more or less evenly in three blocks among applications of less than one megawatt, one to five megawatts, and five to twenty megawatts. TXCHPI believed that CHP applications that range in size from 100 kilowatts up to a few megawatts can help satisfy the energy efficiency goal in Texas. TXCHPI stated that energy efficiency incentive payments may have a significant impact on the decision of the customer to implement CHP, particularly for the smaller systems, where incentive payments could offset large capital investments. UTC Power agreed that the proposed rule properly included CHP as an eligible technology in the standard offer and market transformation programs.

Commission response

The parties that oppose including CHP as an eligible measure have not made a convincing case that the technology is either impermissible under the statute or is inconsistent with its purposes. The comments of the proponents have provided an accurate description of the benefits of CHP. These comments demonstrate that CHP provides a significant energy efficiency opportunity that, outside of large-scale industrial applications, is not being harnessed today. The commission concludes that CHP should be a permissible technology under the rule, with appropriate limits. The commission disagrees with Good Company that the proposed rule does not comply with PURA §39.912, which requires that a CHP study be performed in order to determine how best it can be implemented. The fact that a study is required of CHP does not preclude the commission from initiating a program that is otherwise consistent with the statute.

The commission agrees with EUMMOT's suggestion that eligible CHP projects should be limited to those that are ten megawatts or less in size. The commission has repeatedly noted that this rule provides utilities broad latitude in the selection of programs, so that a utility could decide that a program that was open to CHP would not help it achieve its energy efficiency goals, based on the circumstances in its service area. The commission believes that utilities' discretion with respect to program selection should re-

flect factors that relate to the likelihood of achieving savings, the ability of a sponsor to provide verifiable savings, and the cost-effectiveness of a project, however. CHP should not be arbitrarily rejected by utilities. The commission concludes that the other limitations that EUMMOT recommended are not necessary, and that the size limit, together with other program restrictions will likely exclude CHP projects that would otherwise be problematic. The fact that industrial customers' role in the energy efficiency program is more limited than in the past will also help avoid projects that are primarily for energy export, rather than meeting a customers' energy needs. Finally, the rule requires that utilities' energy efficiency programs serve all classes of customers. This requirement and the budget limits that the legislature has established for 2008 and 2009 will necessarily limit the amount that utilities will have available to provide incentives for CHP and prevent the incentives for CHP from foreclosing other beneficial energy efficiency programs.

The commission disagrees with TXCHPI's suggestion to transpose "combined heat and power technologies" with "renewable DSM technologies." The order in which technologies are listed in a provision of the rule does not imply a preference for one over another.

Texas ROSE and TLSC proposed that incentive payments could vary by customer class, but not within a customer class. The proposed language permits utilities to practice discrimination in the payment of incentives, and, in their view, the explicit non-discrimination provisions in the current rule should be retained. The programs are funded equally by all customers in the residential and commercial classes, and the incentives that are paid should also be paid to all participating customers equally.

Texas ROSE and TLSC recommended under subsection (l)(5) that the programs operated by the TDUs be completely separate from the programs operated by ERCOT to assure that both the TDU and ERCOT have a sufficient amount of available load for curtailment when necessary. Texas ROSE and TLSC noted that the ERCOT load resource programs are operating in a competitive wholesale market environment where values are assigned to loads acting as a resource, and these are market driven programs that should remain market driven and should not be eligible for energy efficiency incentives. Texas ROSE and TLSC concluded that PURA has no provision to support the co-mingling of load curtailment resources and the rule should be written to assure that there are two separate pools of resources available for two different levels of system emergency. They also recommended that the rule be improved by clarifying how TDU and ERCOT load control systems should work together to provide a higher level of system reliability.

Good Company noted that §25.181(1)(5) prohibited EESPs from receiving incentives under the utility program for the same demand reduction it is compensated for under an independent system operator (ISO) program. Good Company shared the commission's concern for "double-dipping," and noted that this more appropriately applies to industrial load management programs where a former participant in interruptible rate programs is forced to choose between selling the exact same demand reduction in either a load management program or the Emergency Interruptible Load Service (EILS) program, but not both. Good Company stated that this issue requires closer examination in the context of residential and commercial demand response, however, because a program may be encouraging investment in the capability to provide demand response. Good Company noted in that case, it would be counterproductive to prohibit the employment of this capability to provide services to ERCOT, requiring ERCOT to purchase additional resources. Good Company stated that Occidental Chemical argued in the Protocol Revision Subcommittee that participants in EILS should be able to also participate in arbitrage (passive demand response) and activities to avoid transmission charges by reducing demand during periods when a peak is expected to be set during the four months that are critical in establishing ERCOT transmission charges. Good Company believed that there may be a benefit to permitting an EILS participant to also provide local reliability services to a TDU, as is currently the case in New York City, or to similarly engage in "passive demand response." Good Company stated the focus should be on cost effectiveness, not a buzz word like "double dipping." Good Company suggested if we are going to encourage demand response, we want to ensure market participants receive maximum value from this resource.

Commission response

The commission does not agree with Texas ROSE and TLSC's comments regarding discrimination. There may be valid reasons to provide higher incentives to one set of customers in a class than to other customers in the same class. The prior rule permitted higher incentives in areas that had either special environmental circumstances or that were transmission constrained. One of the concerns that is reflected in the proposed rule was that there may be a need to provide higher incentives in areas that have historically been underserved. The rule that is being adopted includes a requirement that utilities report underserved areas, and the commission may in the future decide that action to remedy geographic inequities is appropriate. In any event, the commission concludes that the specific non-discrimination provisions in the prior rule may be inconsistent with legitimate program objectives, and it is not adopting them in this rule. Just as distinct groups like the hard-to-reach customers may require a higher incentive, higher incentives may be required to reach customers in small towns, if there are fewer companies in small towns that have the energy expertise to serve as EESPs and take advantage of the benefits of this rule. There may be other reasons that are not anticipated now why it would be reasonable to establish different incentives based on other appropriate criteria. The purpose of the change in the rule is not to promote discrimination but, rather, to facilitate cost-effective programs that will help the utilities reach their goals and reduce the disparities in participation that may have occurred under the current rule. If there are customers in small towns and rural areas that have not been able to benefit from the program, they have been paying for the program without directly benefiting from it.

The commission does not agree with Texas ROSE and TLSC's argument that the programs operated by utilities be completely separated from programs operated by an ISO or that the rule should clarify how utility and ISO programs separately contribute to system reliability. Subsection (l)(5) states that a load-control standard offer program shall not permit an EESP to receive incentives from both a utility program and a program conducted by an ISO for the same demand reduction. To the extent that a demand response measure provides demand reduction capability in a utility program and a program operated by an ISO in different periods, for example, there is no reason why the measure should not be able to receive incentives from both a utility and an ISO. There may be other instances in which a measure can provide distinct value in the utility and ISO programs, without getting paid twice for the same savings. The burden should be on the utility to determine whether there is a benefit from a utility program that is consistent with system adequacy and reliability

objectives and does not provide double payment for the same system benefit.

The commission does not entirely agree with Good Company's comments on this issue either. The rule would prohibit an EESP from receiving an incentive for the same reduction in a consumer's demand for which it is receiving a payment from an ISO. The commission is concerned about the integrity of the program, both from an operational and payment perspective. If an EESP commits to provide two megawatts of demand reduction in an ISO program and a utility program, there is a risk that the ISO and the utility will expect a total of four megawatts of response. Both need to know exactly what level of minimum response they can expect to meet the objectives of the two programs. By the same token, as a utility and the commission are evaluating the cost effectiveness of the utility and ISO demand response programs, they need to be able to rely on the fact that the amount paid in each program represents a unique demand resource. Some of the examples provided by Good Company do not explain clearly how a resource that is providing demand response to ERCOT and a utility would be distinct. For example, a service that provides load reduction for ERCOT emergencies and local utility transmission system emergencies could be called on by both ERCOT and the utility for the same event, unless the program rules very clearly differentiate these emergency conditions. The rule that is being adopted will permit payments under a utility demand response program only if it is clear that a participant would not be paid twice for the same response.

§25.181(m): Energy efficiency plans and reports

Reliant proposed specifying that the proposed annual budget submitted in the plan and report would be subject to the budget limitations in subsection (f)(8) to provide clarity and consistency regarding submission of proposed budgets.

Good Company proposed specifying that the plan and report would include supporting documentation for the utility's total actual and weather-adjusted peak demand and actual and weather-adjusted peak demand and energy consumption for residential and commercial customers for the previous five years. Good Company expressed concern that without documentation and assurance that utilities are employing similar methods to calculate peak demand, it is conceivable that a utility might under-report peak demand and under-value annual demand growth, reducing required expenditures on efficiency programs and undermining the intent of the efficiency goal. Good Company recommended adding a section that requires information on utility administrative and R&D expenditures and allocations. Good Company believed a new section was needed because "historically, utilities have not been required to report on how administrative funds and R&D are expended."

Texas ROSE and TLSC recommended that information be provided in advance of filings to allow all parties, including the commission staff, to schedule processes for review and approval. Texas ROSE and TLSC suggested that the information include a brief explanation of programs, deemed savings updates and other filings the utility plans to make that will require review, evaluation, and approval by the commission.

Reliant proposed that the plans should include a discussion of how the utility is encouraging and facilitating retail electric providers to deliver energy efficiency and demand response programs. ARM and TXU Energy also proposed modifications regarding reporting of best efforts used to facilitate the involvement of the region's retail electric providers in the delivery of efficiency programs and demand response program. TXU Energy proposed a requirement that the utilities describe their efforts, as absent such a regulatory requirement, the somewhat nebulous requirement of "best efforts" to encourage and facilitate the involvement of the region's retail electric providers in the delivery of efficiency programs and demand response program could become meaningless. TXU Energy stated that a description of the utilities' efforts would be a tool that helps the commission, the legislature, and other interested parties assess whether the goal of the statute is being achieved.

Cities proposed that the expenditures for the prior five years include the performance bonuses and other costs, along with total retail customer savings by program and customer class.

CenterPoint recommended deleting subsection (m)(1)(T) and stated that there is no standard that can be applied and no realistic way to determine whether a county is "under-served" by an electric utility's energy efficiency programs, and therefore there is no reason to include a metric that can not be objectively measured in the energy efficiency reports submitted to the commission. CenterPoint argued that the utility's energy efficiency programs are as much a function of the attitudes of the end-use customers in that area as it is a function of the promotional efforts of the electric utility and the energy service providers.

TXU Energy proposed addition of the requirement for identification of all specific actions that were undertaken by the utility to deploy net metering and advanced metering information networks as rapidly as possible. TXU Energy stated that the reporting requirement should be a tool that helps the commission, the legislature, and other interested parties assess whether the goal of the statute is being achieved. TXU Energy proposed that utilities be required to provide a description of incentives for REPs and competitive energy service providers to acquire additional cost-effective energy efficiency for residential and commercial customers sufficient to achieve the annual energy efficiency targets.

The Sierra Club believed that the commission should require that utilities look more broadly at the gains they could make through energy efficiency programs by January 15, 2009. The Sierra Club was supportive of language submitted by Public Citizen, Environmental Defense and SEED that would require additional reporting of utilities, as well as better coordination between the reporting required by the commission, the State Energy Conservation Office (SECO), and ERCOT; provide information related to the commission's report to the legislature that is due by January 15, 2009; require the commission to report energy savings from the utility programs to ERCOT; and require the commission to develop reporting formats. Public Citizen, Environmental Defense and SEED asked the utilities to examine the full energy efficiency potential for their service areas, instead of limiting it to fifty percent. Public Citizen, Environmental Defense and SEED stated that the American Council for an Energy-Efficient Economy (ACEEE) recently found that Dallas could meet 101% and Houston could meet seventy-six percent of projected load growth through energy efficiency, combined heat and power and onsite renewable energy generation by 2023, saving twenty-four percent of their demand.

Public Citizen, Environmental Defense and SEED Coalition stated that utilities should be required to analyze the potential for combined heat and power in hospitals, universities, industrial, commercial and other facilities. They noted that the data from utility analyses should be reported to the commission for use in tracking the progress of the projects and, in turn, the

commission should report it to ERCOT for use in determining load growth projections. These parties recommended that the commission specify the format for reporting data to SECO and require incorporation of data from the reports made to SECO by municipal utilities, cooperatives and other governmental bodies into the ERCOT long-term demand forecast. They noted that this will ensure that the energy efficiency gains and projected energy savings made by these entities are included in calculations of long-term energy needs for the state.

Public Citizen, Environmental Defense and SEED urged that in order to ensure accurate and complete information about all potential sources of energy for Texas, the commission should require ERCOT to include the findings of SECO's ongoing renewable energy potential study in its long-term demand forecast. SEED Coalition stated taking these actions to strengthen energy efficiency implementation would help protect the health of Texans and our economy, while spurring the development of a new generation of efficiency products.

Commission response

The commission does not agree with Reliant's suggestions regarding consistency of the proposed budgets with other provisions of the rule. The commission concludes that consistency with other provisions of the rule is required without this change.

The commission agrees with Good Company's proposal to require that the plan and report include supporting documentation regarding the utilities' calculations showing demand growth. The rule the commission is adopting includes this modification to the reporting requirements. The commission does not agree with Good Company's comments regarding research and development, and administrative cost reporting. The commission notes that proposed subsection (m)(1)(I), which is subsection (m)(2)(I) in the rule that is being adopted, requires the utilities' proposed annual budgets to detail administrative costs, including specific items for research.

The commission does not agree with Texas ROSE and TLSC's suggestions to require utilities to provide information about programs for other parties, and Staff, to review prior to filing the report required in this subsection. Under the rule, the utilities must report the results of these programs to the commission on or before April 1 of each year. This requirement should be sufficient to permit the programs to be reviewed and evaluated, and it would be difficult for utilities to report the prior year's and the next year's programs any earlier.

Reliant, ARM, and TXU Energy made similar suggestions that would require utilities to report on efforts to facilitate REPs' inclusion in the "delivery of programs." The commission concludes that it is reasonable to have the utilities include such information in their annual reports, and modifies the rule to include such a requirement.

The commission agrees with Cities that performance bonuses should be included in the annual reports, and that customer savings should be reported by program and customer class.

The commission does not agree with CenterPoint's suggestion to delete subparagraph (T). While the commission does not disagree that there is no standard for determining whether a county is "under-served," the commission believes that it is appropriate to require utilities to report information that will permit the commission to assess whether areas are "under-served." These reports should help the commission consider whether it should develop a standard for determining under-served areas in future revisions of the program.

The commission disagrees with TXU Energy that information relating to net metering and advanced metering networks should be included in subsection (m). The commission has adopted separate proceedings to deal with net metering and advanced metering, and reporting requirements on those topics can be addressed in those proceedings.

The commission does not agree with the Sierra Club, Public Citizen, Environmental Defense and SEED's proposed inclusion of reports of various data, calculations and assessments in the utilities' April 1, 2008 report, to support the commission's report to legislature in January 2009. PURA §39.905(b-2) requires the commission to make this report to the legislature, and the commission has issued a request for proposals (RFP) for an expert in this field to assist the commission in preparing the report. For this reason, the inclusion of information related to the report in the utilities' reporting requirements is not necessary. In addition, some of the assessments proposed by the commenters would not be possible for the utilities to produce by April 1, 2008. The commission does not agree with Public Citizen, Environmental Defense and SEED's request to utilities to examine the full energy efficiency potential for their service areas and not limit the potential to fifty percent. As is noted above, the commission is issuing an RFP to hire an expert to prepare a report for the commission, and the utilities need not provide the information requested by these parties. In addition, the analyses for potential for CHP, and format for reporting data to SECO, are being handled by other means at the commission. With regard to the SECO report on renewal energy potential, the commission concludes that its activities in connection with the determination of competitive renewable energy zones represent an effort to incorporate a significant level of additional renewable energy in the state, consistent with recent amendments of PURA. To the extent that the SECO report is a useful policy guide, the commission will consider it when it is issued.

§25.181(n)

Regarding the review of programs under proposed subsection (n), Cities proposed in any event at least one such review shall be conducted every three years.

EUMMOT expressed concern that an interested person could initiate a review of a utility's programs based on "the failure of the utility to implement a program, as this language might lead product vendors or salesmen to initiate costly and burdensome regulatory reviews in hopes of persuading the commission to order a utility to start a new program for the purpose of promoting some specific technology or product." EUMMOT suggested that the EEIP, described in §25.181(q), be used as the forum to discuss new programs and the language referring to "the failure of the utility to implement a program" be removed from §25.181(n). EUMMOT stated that the responsibilities of the EEIP already encompass the development of new programs, so there is no need for the reviews described in §25.181(n) to include such activities.

CenterPoint strongly urged deletion of subsection (n) or at the very least limiting the review of an electric utility's programs to the commission's staff. CenterPoint noted a provision that invites "an interested person" to seek a review of an existing energy efficiency program or a proposed new program, or complain that an electric utility has not implemented a specific energy efficiency program that the "interested person" wants is an open door to mischief. CenterPoint stated that even if the proposed

review process does not devolve into contested case proceedings, this subsection would impose costs on the utility and the commission's staff, and inject uncertainty into an electric utility's overall energy efficiency program. CenterPoint stated moreover, that the higher goals for energy efficiency are the responsibility of electric utilities, not "interested persons," and the electric utilities should have the flexibility to achieve those goals subject to commission oversight and without being subject to reviews by interested persons that may have another agenda. CenterPoint concluded because an electric utility's programs will undoubtedly be subject to review under subsection (f) of the rule either in setting the EECRF or in a periodic reconciliation of the EECRF, there is no reason to allow "interested persons" to initiate yet another review of those programs through this proposed subsection (n).

Texas ROSE and TLSC proposed modifying the subsection to require that, when a utility's energy efficiency program includes an EECRF or a performance bonus, the program be reviewed by the commission and interested parties be provided with the opportunity for a public hearing to assure that the programs and costs are just and reasonable and in the public interest. Texas ROSE and TLSC stated that the increase in a utility's minimum energy efficiency goal under HB 3693 should mean bigger and better programs that will save consumers money and reduce emissions and the need to build more power plants. The amendments will also result in utility cost recovery outside of a rate case and performance incentives for utilities that exceed the goals. Texas ROSE and TLSC argued that any energy efficiency plan that includes a cost recovery factor or performance incentive should be subject to a review by all parties and approved by the commission. Texas ROSE and TLSC disputed language in the proposed rule that would allow planned activities to be carried out during a review, and that would permit a utility to move forward with planned programs even if a party makes a request for a formal review.

Commission response

The commission does not agree with Cities' suggestion to specify a review of each utility's programs once every three years. The commission believes that utility rate cases or periodic reviews initiated by the staff will afford adequate opportunity for the review of utility programs, and that specifying a time limit for the interval between reviews is not necessary.

The commission agrees with EUMMOT and CenterPoint's proposal to limit those who may initiate a formal review of a utility's programs to commission staff. In addition, the EEIP process provides an opportunity for informal public review of aspects of the utility programs. The commission believes that the proposed rule would have granted virtually any person the right, without adequate justification, to petition for review of any program. The commission believes that this could unnecessarily delay the program and increase costs.

Furthermore, the commission does not agree with Texas ROSE and TLSC's comments that any and all energy efficiency plans should be subject to review and approved by the commission. The commission believes that the utilities must be given flexibility to determine which programs will best ensure that they meet their energy efficiency goals and notes that information regarding the utilities' performance is publicly-available and open to scrutiny by any interested person. While the energy efficiency program has been successful in the past, the higher goals enacted as a part of HB 3693 suggest the need for increased flexibility, so that utilities can implement new programs and terminate programs that are out of date, without burdensome and time-consuming prior regulatory reviews.

§25.181(o): Inspection, Measurement and Verification

TXU Energy argued that the accepted measurement and verification protocols be sufficiently broad and flexible to account for demand and energy savings that may be available through non-traditional programs. TXU Energy suggested, for example, utilizing new advanced metering technology and measurement capabilities, programs that depend on customer behavior can be proven through statistical means to deliver demonstrated peak demand and/or energy savings.

Reliant proposed that an ESCO be permitted to either obtain a signed contract, or use other means that are acceptable to the utility to demonstrate that the measures have been installed prior to final payment being made to the energy efficiency service provider. Reliant envisioned situations where having to go to the customer for a wet signature to comply with this provision would be impractical and unnecessary. Reliant stated, for example, that if a REP offered a direct load-control pilot program, site inspections for a sample of the sites would be adequate to verify the equipment installation if the equipment is installed outside of the home, but it wouldn't be necessary or practical to obtain a signature from each customer. Reliant concluded that development of a robust market for Smart Energy solutions will provide additional proof that properly structured competitive markets are the best way to deliver value to retail electric customers.

Cities proposed that a utility should not receive performance bonuses or cost recovery for incentive payments for any energy efficiency program until such programs are inspected and related savings are measured and verified. Cities proposed modifying the requirement under §25.181(o)(1) that the EESP would be responsible for the measurement of energy and peak demand savings to include that "the utility is responsible for verifying the reasonableness of the measured savings." Cities proposed modifying the requirement under §25.181(o)(2) that deemed savings may be used in lieu of the energy efficiency service provider's measurement and verification "only in such instances where it is not cost-effective or feasible to measure and verify savings through standard measures."

Commission response

The commission does not agree with Cities' suggested specific modification to ensure that a utility not receive performance bonuses or incentive payments until the programs are inspected and savings are measured and verified. The rule that is being adopted provides, "An energy efficiency service provider shall not receive final compensation until it establishes that the work is complete and measurement and verification in accordance with the protocol verifies that the savings will be achieved." The commission concludes that this provision requires sufficient verification of energy savings prior to affording the utilities cost recovery. The commission has adequate means to review the utilities' programs and take action if a utility reports savings that have not been achieved or adequately verified. The commission does not agree that deemed savings should be used only when it is not cost-effective to use standard measurement and verification procedures. One of the reasons for using deemed savings is that they are more cost-effective for use in situations in which the same measures are being installed at numerous locations, such as in residential retrofit situations. There may be other circumstances in which the development and use of deemed savings may be appropriate, and the commission does

not believe that it is appropriate to foreclose this possibility in the rule.

As is noted above, the commission concludes that non-traditional programs that depend on technology coupled with customer behavior have a place in the energy efficiency program. Accordingly, the measurement and verification procedures need to be able to assess the validity of savings reported by such non-traditional programs. The commission concludes, however, that the rule as proposed is sufficiently broad that it would address such programs and that a specific reference to non-traditional programs is not necessary.

The commission agrees with Reliant's recommendation that the commission should allow "other means" to obtain customer approval for particular projects prior to final payment being made to any ESCO. The commission believes that no such project or measure can be performed without a customer's direct and express agreement to participate, however.

§25.181(p): Weatherization program

Texas ROSE and TLSC recommended that this subsection be renamed "targeted energy efficiency" to distinguish it from other weatherization programs that are not coordinated with the federally funded program.

Commission response

The commission agrees with Texas ROSE and TLSC's recommendation to modify the title of subsection (q) to include the phrase "targeted energy efficiency."

§25.181(q): Energy Efficiency Implementation Project - EEIP

Cities, TXU Energy, OPC, EUMMOT, Texas ROSE and (TLSC), and EPE agreed with the concept of an EEIP. OPC agreed that a commission review process would be needed to review programs, but the Cities were not supportive of any limited review of energy efficiency programs. Cities contended that it is good for the public to have a voice, and the commission should never forget that they are paying for the program. Cities, Texas ROSE and TLSC, and TXU Energy proposed modifying this subsection to be mandatory rather than permissive. Cities recommended inclusion of "savings and measurement and verification methods" within the scope of the EEIP.

EUMMOT proposed that the process described in §25.181(q) be the forum to discuss proposed new programs, which would allow the language relating to the failure of the utility to implement a program to be removed from §25.181(n).

TXU Energy expressed concern for inclusion of a process to allow commission staff and utilities to review proposals that contain confidential or sensitive competitive information. TXU Energy urged the commission to provide guidelines and consider alternative processes to approve programs that are competitively sensitive. TXU Energy stated that the market will continue to evolve and develop, while innovations in energy efficiency technologies, products, and services will continue to occur at a rapid pace. TXU Energy noted that, given these changes and the expectations placed on utilities, REPs, and EESPs, the rule should recognize these new roles and expectations, and not place unnecessary limitations on these entities that are trying to achieve demand and energy reductions. TXU Energy suggested the rule should also allow for new technologies and innovations to help reduce future demand. TXU Energy stated new programs and services offered by REPs in particular should be allowed to participate so long as they can demonstrate a verifiable reduction.

TXU Energy stated that the commission should be clear as to what authority it is granting this EEIP, and whether commission approval is necessary regarding EEIP decisions. TXU Energy believed that the commission should retain approval responsibility, which may be accomplished through updates from staff memos and discussions at commission Open Meetings. TXU Energy concluded that, just as HB 3693 recognized a new and expanded role for REPs in the delivery of energy efficiency programs, the EEIP must also include adequate and appropriate representation of REPs' interests. While it may be true that some REPs have participated in the past, it is important that the commission provide a mechanism to ensure that REPs participate.

Texas ROSE and TLSC recommended that the commission establish two time frames per year for EEIP review of new proposals and amendments, which Texas ROSE and TLSC described as a process for utilities to submit new proposals and amendments. Texas ROSE and TLSC suggested, at a minimum, that the process include notice in the "In Addition" section of the *Texas Register* and notice using the commission's energy efficiency list-serve, a facsimile, or the U.S. mail; a timeline for parties requesting the change to provide information on the proposal to interested parties allowing not less than 15 days for review; and, if requested, a workshop to be held to explain substantive proposed changes. Texas ROSE and TLSC noted that, if within 30 days of the workshop, no party appeals the proposed change, the commission staff would request approval of the changes by the commission. Texas ROSE and TLSC suggested that if the proposal is appealed, the staff would establish a procedural schedule for hearing the appeal. Texas ROSE and TLSC suggested that approved changes be filed in a permanent docket established for the purpose of retaining the decisions in one location. Texas ROSE and TLSC proposed that parties be provided access to the deemed savings estimates and program templates on an on-line website. EPE and EUMMOT agreed that a streamlined process for introducing new energy efficiency programs and for changing existing programs would enable the utility program managers to make appropriate and necessary changes to their programs in a timely manner.

Texas ROSE and TLSC argued that provisions have been made to avoid, rather than encourage, review and evaluation of programs and plans, which is contrary to PURA §39.905(d). Texas ROSE and TLSC noted that the EEIP process is time consuming, but it served the energy efficiency effort well in designing programs that are by no means perfect but allow the industry to meet the energy savings goals established by the statute.

Texas ROSE and TLSC expressed disappointment in the ability of the consumers interested in energy efficiency to access the programs and the lack of information about how consumers are benefiting from the incentives being paid to contractors. Texas ROSE and TLSC suggested that using a public process with full participation by interested parties is the most effective strategy for making improvements that will remove barriers to consumers being more informed and aware of energy efficiency program options.

Commission response

The commission disagrees with Cities, Texas ROSE and TLSC, and TXU Energy's proposal to make the EEIP mandatory. The commission envisions using the EEIP as it is needed to address issues within its scope, but progress in modifying the energy efficiency program should not be dependent on whether the EEIP meets, as commission resource issues may at times make it difficult for the commission to manage the EEIP.

The commission agrees with EUMMOT's suggestion that EEIP is the forum to discuss proposed new programs, but the commission is not modifying the utilities' discretion to determine which programs to implement in order to meet their statutory obligations and goals.

The commission does not agree with TXU Energy's inclusion of a process to limit the review if proposals that contain confidential or competitively sensitive information to commission staff and the utilities. The commission believes that most discussions in the EEIP can be open, and that confidentiality issues, if they arise, can be resolved on a case-by-case basis. The commission disagrees with TXU Energy's comments that EEIP decisions should be made through Open Meetings discussion, because such a procedure would not provide finality to matters under dispute. Where the informal discussion process in the EEIP is unable to resolve issues that arise concerning the energy efficiency program, and decision-making is not within a utility's discretion under this section, the commission may use the review process under subsection (n) to resolve issues.

The commission does not agree with TXU Energy's proposal to include a specific mechanism for retail electric providers to participate in EEIP. REPs clearly have an interest in the energy efficiency program and would have an opportunity to participate in the EEIP. The commission disagrees with Texas ROSE and TLSC's suggestion to establish two timeframes per year for EEIP review of new proposals, but it believes that notice of the EEIP should be provided and it has included notice provisions in the rule that is being adopted. The commission concludes that the EEIP is also an appropriate forum to address Texas ROSE and TLSC's suggestion to improve the information available to consumers interested in energy efficiency regarding the benefits, incentives and program options.

§25.181(r): Retail providers

ARM stated that the market has matured and become fully competitive and REPs are beginning to look beyond providing basic commodity service to their customers, and one of the areas of great interest to many of them is the area of energy efficiency. ARM contended that, in view of HB 3693, §25.181 should reflect the larger role that the legislature envisioned that REPs will and should play in the provision of energy efficiency services; therefore ARM believed that the rule should be provided with more "teeth" in recognition of this expanded REP role.

Good Company expressed concern about the cost associated with utilities outside of ERCOT providing energy efficiency education materials to their customers. Good Company stated that detailed requirements and utility responsibilities should be provided regarding this material.

Texas ROSE and TLSC suggested mandating that REPs and electric utilities outside of ERCOT provide customers energy efficiency information by April 1, 2008, conduct a program every year in April and September, and, at a minimum, establish a voluntary REP program to provide rebates to consumers for purchase of energy efficient appliances. Texas ROSE and TLSC recommended a requirement that a REP that provides information and access to energy efficiency plans provide access on a non-discriminatory basis to its residential customers regardless of the customer's selected rate plan. Reliant opposed Texas ROSE and TLSC's proposed timelines for REPs to provide customers energy efficiency information. Reliant stated that REPs already provide education and concluded that a timeline was not needed.

TXU Energy stated that HB 3693 expressed the legislature's desire to shift some of the traditional utilities' energy efficiency role to REPs. Specifically, the legislature required the REPs to provide customers with energy efficiency educational materials, and imposed new requirements on the TDUs, and allowed the commission to encourage the REPs to provide individualized energy reports. TXU Energy also noted that §20 of HB 3693 plainly states "it is the intent of the legislature that net metering and advanced meter information networks be deployed as rapidly as possible to allow customers to better manage energy use and control costs, and to facilitate demand response initiative." TXU Energy claimed this rulemaking was an important step to ensure that legislative intent was achieved.

TXU Energy argued that the proposed rule included only one of the two requirements imposed on the utilities' relationships with REPs, and that the inclusion of only one of the two requirements could cause confusion. TXU Energy suggested the addition of reference to the requirement that utilities provide "incentives sufficient for retail electric providers and competitive energy service providers to acquire additional cost-effective energy efficiency for residential and commercial customers" sufficient to achieve the annual targets.

Commission response

The commission agrees with ARM's comments that the market has matured and retail electric providers will have a significant impact and involvement in energy efficiency. However, the commission believes that PURA §39.905(a)(4) simply mandates that each electric utility in ERCOT use its best efforts to encourage and facilitate retail electric provider involvement.

The commission understands Good Company's concerns regarding the costs associated with providing energy efficiency education materials, but it concludes that the reporting requirements established in the rule should provide the commission adequate tools to monitor education expenses and programs, so that additional requirements are not necessary. In particular, the commission agrees with Reliant, and disagrees with Texas ROSE and TLSC's comments relating to an April 1, 2008 deadline for providing customers energy efficiency information. The commission concludes that adopting a specific deadline is unnecessary and impractical. To balance workload and meet other program goals, utilities may want to time their information delivery and project delivery in ways that would be impractical under the Texas ROSE and TLSC proposal.

The commission also disagrees with Texas ROSE and TLSC's proposal to require rebates to customers for purchases of energy efficiency appliances. While utilities may choose to use such programs, the commission believes that the utilities that are responsible for the costs and success of the program should have the latitude to select programs that will best achieve the goals of the program. In addition, while the commission concludes that Texas ROSE and TLSC's comments regarding access to plans and information on a non-discriminatory basis reflect objectives, the parties participating in this rulemaking proceeding have not had an adequate opportunity to comment on the proposal. There are likely to be valid reasons for offering different energy efficiency programs to different customers. In particular, REPs may not see an economic benefit in offering high-cost programs to customers who have not committed to a term of service with the REP. If the commission is to encourage REP participation in the energy efficiency program, it must avoid adopting onerous restrictions on the REPs.

The commission recognizes that net metering and advanced meter information networks are important topics addressed in HB 3693, and the commission has specifically opened separate projects to address these crucial projects. These technologies should also foster opportunities for REPs in providing energy efficiency and distributed generation options to their customers. The commission has not made any specific changes in the rule in response to these comments, because these topics are being addressed in other projects.

Finally, the commission disagrees with TXU Energy's suggestion to add a reference to the requirement that utilities provide "incentives sufficient for retail electric providers and competitive energy service providers to acquire additional cost-effective energy efficiency for residential and commercial customers." Language to this effect is included in subsection (a)(3) and does not need to be repeated in subsection (r).

§25.181(s): Customer protection

Public Citizen, Environmental Defense and SEED recommended that the final arrangement between the EESP and customer, include an estimate of energy cost savings and an approximate payback period based on that estimate. Public Citizen, Environmental Defense and SEED agreed with, and TXU Energy opposed, the inclusion of a provision stating that an EESP is not part of or endorsed by the commission or the utility. TXU Energy expressed concern that it may be necessary to explain the program to the participating customer and suggested an additional provision that "the energy efficiency service provider must not imply or infer that they are endorsed by the commission or the utility."

TXU Energy supported efforts to protect customers and suggested this section track PUC Substantive Rule §25.471 in providing the disclosures and to include the contractual provisions for residential and small commercial customers. TXU Energy suggested that for clarity the customer's rights under subsection (s)(1)(A) should track PUC Substantive Rule §25.474(j), which would allow the customer to "rescind the agreement to receive the energy efficiency service or product without penalty or fee of any kind for a period of three federal business days." TXU Energy suggested that tracking §25.471 would support efforts to protect customers in ways that are similar to the protection for customers who select or switch REPs.

OPC urged inclusion of the Office of Attorney General's Consumer Protection hotline in this subsection, and TXU Energy proposed exclusion of the Office of Attorney General's Consumer Protection hotline. TXU Energy believed that the commission has primary jurisdiction over these programs and should be the entity the REP is required to mention. OPC argued that providing the customer as many resources as available would be beneficial to the customer.

TXU Energy, Good Company and EUMMOT proposed deletion of subsection (s)(1)(C), which requires disclosure of the fact that incentives are made available to the EESP through a program funded by utility customers, manufacturers or other entities and the amount of any incentives provided by the utility. TXU Energy stated that this should be removed due to the confusion it may cause, because the participant may not understand this refers to the statute, and the amount provided by the utility may or may not be included in the offering from the REP to the customer. Good Company stated that the disclosure provision might prove especially burdensome to EESPs, and that specific utility incentive amounts to be awarded may be unknown until after the measurement and verification of savings. EUMMOT noted that, for rented dwelling units, it is not clear whether the landlord or tenant should be provided with this information. EUMMOT concluded that the Host Customer Agreement presented to the program participant already contains a disclosure that an incentive will be provided to the EESP or project sponsor, and it therefore would not be beneficial to the customer benefiting from the program to know that the amount of customer incentive oftentimes would be zero. According to Texas ROSE and TLSC, a contractor should be required to disclose the total amount of incentives being provided and the amount that will be provided to the customer. Texas ROSE and TLSC suggested that a form be developed and approved by the commission that may be used to satisfy the requirements of this subsection.

TXU Energy suggested that subsection (s)(1)(H) be clarified so that disclosure to the customer regarding the liability insurance to cover property damage carried by the EESP and any subcontractor be required only if applicable. TXU Energy and Good Company suggested that subsection (s)(2)(B) be clarified so that the energy efficiency service provider's contract with the customer could include a waiver of customer protections for commercial customers with a peak load exceeding 50kW, to be consistent with the allowance of this waiver for commercial customers at the beginning of subsection (s). TXU Energy recommended that the requirement under subsection (s)(3) for an "All Bills Paid" affidavit to be provided by an EESP to a customer following the installation of energy efficiency measures be permissive rather than mandatory.

Texas ROSE and TLSC noted that language was added to the proposed rule as §25.181(s)(1)(F), requiring the EESP to disclose "any adverse environmental or health effects associated with the energy efficiency measures to be installed." They argued that this provision directly contradicts §25.181(e)(3)(B)(iii), stating that a project that results in negative environmental or health effects is not eligible for incentive payments. According to Texas ROSE and TLSC, the provision in subsection (e) is correct and should remain, and the provision in subsection (s) should be deleted.

Commission response

The commission does not agree with TXU Energy's proposed exclusion of a reference to the Office of Attorney General's Consumer Protection hotline in subsection (s) and agrees with OPC that having more resources will be beneficial to the customer. The commission does not adopt Public Citizen's recommendation that the final arrangement between an EESP and a customer should include an estimate of energy cost savings and approximate payback period based on that estimate. In the deregulated market, an energy service company or REP may market energy efficiency on a number of different grounds, including energy savings potential, and the commission does not believe that it should mandate a particular marketing representation.

The commission disagrees with TXU Energy and agrees with Public Citizen, Environmental Defense and SEED that the EESP should not represent itself as part of or endorsed by the commission or the utility. It would be misleading to customers to permit EESPs to suggest a tie to the commission as a means of inducing customers to use their services.

The commission does not agree with TXU Energy that the customer service protection provisions should track P.U.C. Substantive Rule §25.471, which protects customers who choose or switch retail electric providers, in providing disclo-

sures and providing contractual provisions for residential and small commercial customers. The services provided by EESPs are not necessarily identical or analogous in all instances to services provided by retail electric providers, and, therefore, rules specific to retail electric providers are not apposite to the proposed rule.

The commission disagrees with TXU Energy, Good Company and EUMMOT's recommendation to delete subsection (s)(1)(C), but it does not agree that disclosing the actual amount of incentive to the customer should be required. It is beneficial to the program to have customers understand that it is supported by the utility, but providing information on the amount of the incentive could in many instances be confusing or impracticable. PURA §39.905(b)(5) simply encourages that the "value" of the incentives to be passed on to the end-use customer, which does not require the amount of incentive, even if known or ascertainable, be disclosed to the end-use customer. The commission does not agree with Texas ROSE and TLSC's recommendation that a form be developed for the purpose of disclosing to the customer the "value" of the incentives. The commission believes that the disclosure discussed above will be sufficient to inform the customer and having a standard form would not materially further the program's objectives.

The commission does not agree with TXU Energy and Good Company's suggestion to amend subsection (s)(2)(B) to explicitly permit the waiver of customer protections for commercial customers with a peak load exceeding 50kW. This modification to subsection (s)(2)(B) is not necessary, because subsection (s) permits the waiver of disclosures and certain contractual provisions for commercial customers with a peak load exceeding 50kW. The commission does not agree with TXU Energy's suggestion to make the "All Bills Paid" affidavit in subsection (s)(3) permissive rather than mandatory. The commission believes that this affidavit is an important customer protection. The commission agrees with Texas ROSE and TLSC's proposed deletion of subsection (s)(1)(F), which requires an EESP to disclose potential adverse health or environmental affects.

§25.181(t): Grandfathered programs

Cities recommended limiting grandfathered programs to industrial customers that have been cost-effective with net economic benefits to the participating customers. Nucor and EUMMOT recommended expansion and increased participation in existing load management programs because the legislature intended funding and participation at 2007 levels to be a floor, not a cap. EUMMOT noted that, because the current program requires a ten-year contract, the industrial participants need the ability to sign up new load for participation in the 2008 program and subsequent years. EUMMOT urged that, in order to protect the long-term viability of this program, it was necessary to enable utilities to increase participation in these existing programs. Nucor stated that the legislature clearly recognized the benefits of such programs and sought to ensure their continuation, in light of the concentration on residential and commercial energy efficiency in the new legislation. Nucor concluded that this in no way impacts the goals set for residential and commercial customers, which are specifically set forth in the statute and proposed rule and thus, will not be affected by industrial load management programs.

Commission response

The commission does not agree with Cities' recommendation to limiting grandfathered programs to industrial customers that have been cost-effective with net economic benefits to the participating customers. The statute specifically allows "any load management standard offer programs developed for industrial customers and implemented prior to May 1, 2007," and this language is included verbatim in the rule. The overall structure of the rule, including the bonus provisions, should provide an incentive to the utilities to focus their efforts on programs and participants that provide cost effective savings.

The commission does not entirely agree with Nucor and EUMMOT's proposal to increase participation in existing load management programs. The amended statute is not entirely clear, but it now defines the demand goals in terms of reducing the growth in demand for residential and commercial customers. The statute also includes a provision that directs electric utilities to "continue to make available, at 2007 funding and participation levels, any load management standard offer programs developed for industrial customers" that was implemented prior to May 2007. The commission believes that these provisions are inconsistent with treating the 2007 levels of funding and participation as a floor. The commission concludes that the utilities should have the latitude to sign up customers for the program to replace existing customers, if they leave the program, but that the levels of funding and participation should remain roughly what they were in 2007. The commission has made a minor modification to the proposed rule to reflect this understanding.

§25.181(u): Administrative penalty

EUMMOT, CenterPoint and EPE argued that the proposed provision relating to penalties is unnecessary. EUMMOT, CenterPoint and EPE stated that the commission already has ample authority to assess administrative penalties, and consequently the inclusion of such potentially harsh language is duplicative and unnecessary. EUMMOT suggested that the proposed penalty was contrary to the intent and spirit of the legislation which was intended to provide protection to utilities that have difficulty meeting the mandated goals because of conditions and circumstances totally out of their control in their service territories. CenterPoint questioned the need to have a provision under which an electric utility theoretically could incur an administrative penalty for not achieving, even to a minor degree, a "goal" set out in the rule. EPE rejected the proposed penalty language, and was concerned that the addition of specific penalty language created the appearance of an adversarial relationship between the commission and utilities with regard to meeting the energy efficiency goals instead of a cooperative one. EPE expressed concern because it serves far west Texas, where average energy use is approximately one-third to one-half of the statewide average. EPE stated that virtually all energy efficiency measures that provide significant peak demand and energy reduction savings in most other areas of Texas (e.g., air infiltration reduction, the sealing of ducts, and the replacement of existing air conditioners with higher-efficiency equipment) provide little, if any, energy savings in El Paso. EPE argued this is a market condition over which EPE has almost no influence or control.

In summary EPE noted a commission discussion of this issue, as recorded in the Open Meeting transcript of February 24, 2000, in which the commission noted that the actual implementation of energy efficiency projects is in the hands of EESPs and concluded that penalizing the utility would not be appropriate or productive. Texas ROSE and TLSC recommended that in determining the size of a penalty the commission consider the actions previously taken by the utility to promptly identify underperformance or the potential for underperformance and the steps that were

taken to correct performance issues. They concluded, however, that these provisions should not be interpreted as a free pass for utilities that fail to anticipate change and fail to upgrade their programs to assure their success.

The Sierra Club believed that the proposed penalty provision was reasonable and that the proposed rule should state factors that could be used to impose a sanction and to make it clear that the commission can exempt a utility from a penalty, lessen the penalty, but not forgive it completely. The Sierra Club recommended factors to consider in determining whether to impose a sanction such as the utility's effectiveness in administering its energy efficiency program, and the actions taken by the utility to promptly identify underperformance in meeting the goal and the total amount of money spent on administration.

Commission response

The energy efficiency program has been successful, but not all of the utilities have consistently met their goals, and the commission believes that both administrative penalties and bonuses are appropriate tools to use in appropriate circumstances, to ensure compliance with the rule. The commission agrees with EUMMOT, CenterPoint and EPE that the commission already has authority to assess administrative penalties, but concludes that providing guidance on the factors that the commission would consider in assessing a penalty is useful for the commission and the utilities. Accordingly, the commission adopts the rule with a provision that deals explicitly with penalties. The commission agrees with Texas ROSE and TLSC's comments that the rule should include the factors that are relevant in determining the amount of sanctions and the actions taken by a utility to identify and correct any underperformance. Finally, the commission declines to adopt the Sierra Club's recommendation to include additional factors to be used in assessing a sanction or penalty. The commission has a separate rule that addresses the factors to be considered in assessing penalties in general, and it concludes that these sections provide sufficient guidance for the commission and the utilities that may be subject to sanctions.

Other Issues:

OPC suggested that the rule as published may violate the "content of notice" provisions of the rulemaking section of the Administrative Procedure and Practice Act ("APA") under APA §2001.024. OPC concluded that the proposed rule should be republished for comment consistent with the APA. Texas ROSE and TLSC stated that, unlike the processes followed in other rule publications, this publication provides no redline or other comparison of the existing rules with the proposed rule. Texas ROSE and TLSC requested prior to the adoption of a rule, the commission provide such a comparison for the benefit of the interested parties commenting on the rule.

Commission response

The commission believes that the "notice" provisions of the Administrative Procedure and Practice Act were properly followed and that there is no need to republish the rule, as suggested by OPC, Texas ROSE and TLSC.

Reliant noted that its Smart Energy initiative is offered as context for its comments on the proposed rule. Reliant submitted that Smart Energy puts power in the hands of customers through the four basic concepts: (1) Transparency--knowing how much electricity you use as you use it. (2) Disaggregation--knowing how much each load, *i.e.,* individual appliance, contributes to overall power consumption. (3) Control--the ability to make specific choices about how to use electricity. (4) Differential pricing--the ability to see how the cost of electricity varies over time. Reliant, at the public hearing, stated that OPC and Texas ROSE's comments were misguided regarding pricing programs. Reliant stated that the rule should not discriminate against moving peak usage to off-peak time and stated that pricing structures can align with new technology. Reliant also stated new retail offers for In-Home equipment may appropriately be used to offset cost.

GAP stated that the opportunities for public benefit from cooperation between utilities and local government entities, especially cities and counties, justify some recognition in the rule and some flexibility for cooperatively planning mutually supporting policies and programs. GAP noted that this is especially true in light of the role that HB 3693 envisions for school districts, higher education, municipalities and other government entities. GAP stated the legislature has recognized that these entities have a special role in preparing for our state's energy security. GAP noted that these entities can not only reduce demand and usage, but they can also save tax dollars through these efforts. GAP stated that, in addition to improving the efficient use of electricity in publicly-owned facilities, they can serve as examples and facilitate actions in other sectors of the economy. GAP suggested that this could include set-asides for delivering weatherization or other standard offer programs to target neighborhoods, market transformation programs to improve compliance and enforcement of existing codes and standards.

Commission response

The commission agrees with GAP's suggestion that set-asides for government entities may be appropriate. Proposed subsection (i)(3), which the commission is adopting without change, provides, "A utility may establish funding set-asides or other program rules to foster participation in energy efficiency programs by municipalities and other governmental entities."

OPC noted that the commission has an Advanced Meter Systems Project (Number 34610) in progress and the market participants in that project have expressed an eagerness to deploy the advanced meters in order to offer new products with pricing and rate options. OPC noted that market participants need no incentive to offer new pricing or rate option plans that should result in energy efficiency as they already have a pent-up desire to offer these programs. OPC cited a February 11, 2005 article that lists one of the top three advanced metering benefits for investor-owned utilities to be the ability to have rate choice options. OPC submitted a document in which Reliant suggested the first order of business for the implementation project should be to set priorities for implementation items that must be accomplished in time for summer 2008 product offerings, so that REPs can plan accordingly and the ERCOT system and end-use customers can receive the benefits of mass market demand response. Reliant commented that the commissioners have been clear that they expect one of the benefits of advanced metering deployment to be new retail product offerings for end-use customers. Reliant noted that this goal can not be achieved until a sufficient number of meters are deployed and the necessary data is available to support the products (both at a TDSP portal and locally at the home of the customer).

Texas ROSE and TLSC stated that they have been participating in Project Number 34610 on advanced metering in addition to this project to amend the energy efficiency rule. Texas ROSE and TLSC were uncertain as to how advanced meters may be applied to the implementation of energy efficiency programs, as is frequently implied in the discussion of advanced

meters. Texas ROSE and TLSC noted that some proponents of advanced meters claim they will be able to provide better quality information on customer energy usage and will allow REPs to offer rate packages that vary by time. Texas ROSE and TLSC stated that the rule should be written to define the relationship between these activities and the proposed energy efficiency rule.

Commission response

The commission appreciates Reliant, OPC, Texas ROSE and TLSC's comments regarding advanced metering technology. However, advanced metering issues are being addressed in a separate proceeding.

Texas ROSE and TLSC stated that new issues that are not addressed by the Preamble to the proposed rule should be added to the discussion of the rule that is adopted by the commission, including the following topics:

* How to moderate the impacts of allowing projects that only reduce demand to be funded through rates along with programs that reduce both energy and demand, which, because they reduce emissions, provide greater value.

* The cost impact on residential and low-income consumers resulting from the exclusion of industrial customers from full participation in energy efficiency programs.

* How the rule can be structured to assure that residential and commercial customers benefit from the programs they pay for in their rates.

Commission response

This rulemaking proceeding has given parties an opportunity to raise a number of issues, including the ones specifically noted by Texas ROSE and TLSC, and the commission appreciates the comments of all of the parties that participated in the proceeding. In addition, the issues that Texas ROSE and TLSC have identified as important have been addressed by the commission in this order. The rule that the commission proposed and is adopting stresses the importance of both energy and demand reduction, and provides a greater emphasis on energy savings than the version of the rule that is being repealed. The commission believes that the rule that is being adopted is structured so that residential and low-income customers will derive value from the programs that are implemented by the utilities. The commission has disagreed with the approach that Texas ROSE and TLSC propose on customer impact issues, but it believes that the rule reflects the changes in the statute that resulted from the enactment of HB 3693 and that the incentives for utilities in the rule should result in cost-effective programs that benefit all customers. In addition, the higher goals in the statute and rule should result in opportunities for more residential and low-income customers to benefit directly from energy efficiency improvements to their homes. Finally, the rule requires the utilities to report on under-served areas, which should lead to additional opportunities for customers in areas where the programs have not been widely deployed.

Free Lighting Corporation (FLC) stated that it is a small EESP with approximately twenty-five employees and that during the 2007 program year FLC delivered approximately 3.7 megawatts of demand savings to three utilities in southeast Texas by installing weatherization measures in single family residences. FLC noted that since 2005, it has performed these installations in more than 15,000 homes. FLC was concerned that as a small business that faces the real possibility of being adversely affected economically by the repeal of the current rule, the small, independent EESP can still play a significant role in the program if given the opportunity. At the public hearing, H and L Energy Company, on behalf of FLC, commented that it was a problem for the commission to allow TDUs to alter the current success of programs, and that it is the commission's duty is to ensure those programs that have been successful continue.

Commission response

The commission appreciates FLC's comments regarding the participation of smaller businesses as independent EESPs. One of the objectives of the statute is to develop energy efficiency expertise in Texas, so that customers have reliable sources of information, products and services in a competitive market, whether customers take advantage of the utility programs or not. The main objectives of the new rule are to implement the amendments to PURA §39.905, improve the energy efficiency program, and facilitate the utilities' efforts to meet their higher energy efficiency goals. These changes do not imply that there is no longer a place for small EESPs. In fact, the new subsection (i)(2), which permits set-asides for small projects, may enhance the opportunities for small EESPs.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

16 TAC §25.181, §25.184

The repeals are adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §39.905 (Vernon 2007 and Supp. 2007) (PURA), which provide the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and requires the commission to provide oversight and adopt rules and procedures to ensure that the utilities can meet energy efficiency goals, including a cost recovery factor, an incentive mechanism, the recovery of costs from the customer classes that receive services, and encouraging the value of incentives to be passed on to customers.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §39.905.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2008.

TRD-200801959
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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Proposal publication date: November 2, 2007
For further information, please call: (512) 936-7223

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16 TAC §25.181

The new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §39.905 (Vernon 2007 and Supp. 2007) (PURA), which provide the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction and requires the commission to provide oversight and adopt rules and procedures to ensure that the utilities can meet energy efficiency

goals, including a cost recovery factor, an incentive mechanism, the recovery of costs from the customer classes that receive services, and encouraging the value of incentives to be passed on to customers.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002 and §39.905.

§25.181. Energy Efficiency Goal.

(a) Purpose. The purpose of this section is to ensure that:

(1) electric utilities administer energy efficiency incentive programs in a market-neutral, nondiscriminatory manner and do not offer competitive services, except as permitted in §25.343 of this title (relating to Competitive Energy Services) or this section;

(2) all customers, in all eligible customer classes and all areas of an electric utility's service area, have a choice of and access to energy efficiency alternatives that allow each customer to reduce energy consumption, peak demand, or energy costs;

(3) each electric utility provides, through market-based standard offer programs or limited, targeted, market-transformation programs, incentives sufficient for retail electric providers and competitive energy service providers to acquire additional cost-effective energy efficiency for residential and commercial customers equivalent to at least:

(A) 10% of the electric utility's annual growth in demand of residential and commercial customers by December 31, 2007;

(B) 15% of the electric utility's annual growth in demand of residential and commercial customers by December 31, 2008; and

(C) 20% of the electric utility's annual growth in demand of residential and commercial customers by December 31, 2009.

(b) Application. This section applies to electric utilities.

(c) Definitions. The following terms, when used in this section, shall have the following meanings unless the context indicates otherwise:

(1) Affiliate--

(A) a person who directly or indirectly owns or holds at least 5.0% of the voting securities of an energy efficiency service provider;

(B) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;

(C) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by an energy efficiency service provider;

(D) a corporation that has at least 5.0% of its voting securities owned or controlled, directly or indirectly, by:

(i) a person who directly or indirectly owns or controls at least 5.0% of the voting securities of an energy efficiency service provider; or

(ii) a person in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider; or

(E) a person who is an officer or director of an energy efficiency service provider or of a corporation in a chain of successive ownership of at least 5.0% of the voting securities of an energy efficiency service provider;

(F) a person who actually exercises substantial influence or control over the policies and actions of an energy efficiency service provider;

(G) a person over which the energy efficiency service provider exercises the control described in subparagraph (F) of this paragraph;

(H) a person who exercises common control over an energy efficiency service provider, where "exercising common control over an energy efficiency service provider" means having the power, either directly or indirectly, to direct or cause the direction of the management or policies of an energy efficiency service provider, without regard to whether that power is established through ownership or voting of securities or any other direct or indirect means; or

(I) a person who, together with one or more persons with whom the person is related by ownership, marriage or blood relationship, or by action in concert, actually exercises substantial influence over the policies and actions of an energy efficiency service provider even though neither person may qualify as an affiliate individually.

(2) Capacity factor--The ratio of the annual energy savings goal, in kWh, to the peak demand goal for the year, measured in kW, multiplied by the number of hours in the year; or the ratio of the actual annual energy savings, in kWh, to the actual peak demand reduction for the year, measured in kW, multiplied by the number of hours in the year.

(3) Commercial customer--A non-residential customer taking service at a metered point of delivery at a distribution voltage under an electric utility's tariff during the prior calendar year and a non-profit customer or government entity, including an educational institution. For purposes of this section, each metered point of delivery shall be considered a separate customer.

(4) Competitive energy efficiency services--Energy efficiency services that are defined as competitive under §25.341 of this title (relating to Definitions).

(5) Deemed savings--A pre-determined, validated estimate of energy and peak demand savings attributable to an energy efficiency measure in a particular type of application that an electric utility may use instead of energy and peak demand savings determined through measurement and verification activities.

(6) Demand--The rate at which electric energy is used at a given instant, or averaged over a designated period, usually expressed in kilowatts (kW) or megawatts (MW).

(7) Demand savings--A quantifiable reduction in demand.

(8) Eligible customers--Residential and commercial customers. In addition, to the extent that they meet the criteria for participation in load management standard offer programs developed for industrial customers and implemented prior to May 1, 2007, industrial customers are eligible customers solely for the purpose of participating in such programs.

(9) Energy efficiency--Improvements in the use of electricity that are achieved through facility or equipment improvements, devices, or processes that produce reductions in demand or energy consumption with the same or higher level of end-use service and that do not materially degrade existing levels of comfort, convenience, and productivity.

(10) Energy efficiency measures--Equipment, materials, and practices at a customer's site that result in a reduction in electric energy consumption, measured in kilowatt-hours (kWh), or peak

demand, measured in kilowatts (kWs), or both. These measures may include thermal energy storage and removal of an inefficient appliance so long as the customer need satisfied by the appliance is still met.

(11) Energy efficiency program--The aggregate of the energy efficiency activities carried out by an electric utility under this section or a set of energy efficiency projects carried out by an electric utility under the same name and operating rules.

(12) Energy efficiency project--An energy efficiency measure or combination of measures undertaken in accordance with a standard offer or market transformation program.

(13) Energy efficiency service provider--A person who installs energy efficiency measures or performs other energy efficiency services under this section. An energy efficiency service provider may be a retail electric provider or commercial customer, provided that the commercial customer has a peak load equal to or greater than 50kW.

(14) Energy savings--A quantifiable reduction in a customer's consumption of energy that is attributable to energy efficiency measures.

(15) Growth in demand--The annual increase in demand in the Texas portion of an electric utility's service area at time of peak demand, as measured in accordance with this section.

(16) Hard-to-reach customers--Residential customers with an annual household income at or below 200% of the federal poverty guidelines.

(17) Incentive payment--Payment made by a utility to an energy efficiency service provider under an energy-efficiency program.

(18) Inspection--Examination of a project to verify that an energy efficiency measure has been installed, is capable of performing its intended function, and is producing an energy saving or demand reduction.

(19) Load control--Activities that place the operation of electricity-consuming equipment under the control or dispatch of an energy efficiency service provider, an independent system operator or other transmission organization or that are controlled by the customer, with the objective of producing energy or demand savings.

(20) Load management--Load control activities that result in a reduction in peak demand on an electric utility system or a shifting of energy usage from a peak to an off-peak period or from high-price periods to lower price periods.

(21) Market transformation program--Strategic programs intended to induce lasting structural or behavioral changes in the market that result in increased adoption of energy efficient technologies, services, and practices, as described in this section.

(22) Measurement and verification--Activities intended to determine the actual energy and demand savings resulting from energy efficiency projects as described in this section.

(23) Off-peak period--Period during which the demand on an electric utility system is not at or near its maximum. For the purpose of this section, the off-peak period includes all hours that are not in the peak period.

(24) Peak demand--Electrical demand at the times of highest annual demand on the utility's system.

(25) Peak demand reduction--Reduction in demand on the utility system throughout the utility system's peak period.

(26) Peak period--For the purpose of this section, the peak period consists of the hours from one p.m. to seven p.m., during the months of June, July, August, and September, excluding weekends and Federal holidays.

(27) Renewable demand side management (DSM) technologies--Equipment that uses a renewable energy resource (renewable resource), as defined in §25.173(c) of this title (relating to Goal for Renewable Energy) that, when installed at a customer site, reduces the customer's net purchases of energy, demand, or both.

(28) Standard offer contract--A contract between an energy efficiency service provider and a participating utility specifying standard payments based upon the amount of energy and peak demand savings achieved through energy efficiency measures, the measurement and verification protocols, and other terms and conditions, consistent with this section.

(29) Standard offer program--A program under which a utility administers standard offer contracts between the utility and energy efficiency service providers.

(d) Cost-effectiveness standard. An energy efficiency program is deemed to be cost-effective if the cost of the program to the utility is less than or equal to the benefits of the program.

(1) The cost of a program includes the cost of incentives, measurement and verification, and actual or allocated research and development and administrative costs. The benefits of the program consist of the value of the demand reductions and energy savings, measured in accordance with the avoided costs prescribed in this subsection. The present value of the program benefits shall be calculated over the projected life of the measures installed under the program.

(2) The avoided capacity cost shall be based on the estimated capital cost of a new gas turbine, and the avoided energy costs shall be based on wholesale energy costs.

(A) The initial avoided cost of capacity is $80/kW per year. The avoided cost of capacity shall be adjusted annually based on the annual capacity costs of a new simple-cycle gas turbine, using a recognized industry source of information, adjusted for line losses.

(B) The initial avoided cost of energy is $0.055/kWh. The avoided cost of energy shall be adjusted annually to the simple average of the market clearing price in ERCOT for balancing energy for all hours during the peak period for the previous calendar year. When ERCOT nodal prices are available, the avoided energy price shall be adjusted to the zonal average of nodal prices for all hours during the peak period. For areas outside of ERCOT with a regional transmission organization that has been approved by the Federal Energy Commission and operates a balancing market and publicly reports prices in the market, the avoided energy cost may be adjusted to the simple average of the market clearing price in the region for balancing service for peak hours. For areas that do not have such a regional transmission organization, the ERCOT avoided energy cost shall be used unless the commission determines a different avoided cost for an area.

(e) Annual energy efficiency goals. Electric utilities shall administer energy efficiency programs to achieve at least a 15% reduction in the electric utility's annual growth in demand of residential and commercial customers by December 31, 2008; and 20% of the electric utility's annual growth in demand of residential and commercial customers by December 31, 2009.

(1) A utility may carry over any reduction in growth in residential and commercial demand that is achieved in 2007 in excess of 10% of its growth in demand to apply to the required savings in 2008, to the extent that the reduction is consistent with the definition of demand reduction in this section. Each utility's demand-reduction goal shall be calculated as follows:

(A) Each year's historical demand for residential and commercial customers shall be adjusted for weather fluctuations, using weather data for the most recent ten years. The utility's growth in residential and commercial demand is based on the average growth in retail load in the Texas portion of the utility's service area, measured at the utility's annual system peak. The utility shall calculate the average growth rate for the prior five years.

(B) The demand goal for energy-efficiency savings for a year is calculated by applying the percentage goal, prescribed in this subsection, to the average growth in demand, calculated in accordance with subparagraph (A) of this paragraph.

(C) A utility may submit for commission approval an alternative method to calculate its growth in demand, for good cause.

(D) Beginning in 2009 a utility's demand reduction goal in megawatts for any year shall not be less than the previous year's goal.

(E) Savings achieved through programs for hard-to-reach customers shall be no less than 5.0% of the utility's total demand reduction goal.

(2) Beginning in 2008, an electric utility shall administer an energy efficiency program designed to meet an energy savings goal calculated from its demand savings goal, using a 20% capacity factor.

(3) Electric utilities shall administer energy efficiency programs to effectively and efficiently achieve the goals set out in this section.

(A) Incentive payments may be made under standard offer contracts or market transformation contracts, for energy savings and demand reductions. Each electric utility shall establish standard incentive payments to achieve the objectives of this section.

(B) Projects or measures under either the standard offer or market transformation programs are not eligible for incentive payments or compensation if:

(i) A project would achieve demand or energy reduction by eliminating an existing function, shutting down a facility or operation, or would result in building vacancies or the re-location of existing operations to a location outside of the area served by the utility conducting the program, except for an appliance recycling program consistent with this section.

(ii) A measure would be adopted even in the absence of the energy efficiency service provider's proposed energy efficiency project, except in special cases, such as hard-to-reach and weatherization programs, or where free riders are accounted for using a net to gross adjustment of the avoided costs, or another method that achieves the same result.

(iii) A project results in negative environmental or health effects, including effects that result from improper disposal of equipment and materials.

(f) Cost recovery. An Energy Efficiency Cost Recovery Factor (EECRF) rate schedule shall be included in the utility's tariff to permit the utility to timely recover the reasonable costs of providing energy efficiency programs. The forecast of the energy efficiency program costs shall reflect the spending necessary to meet the utility's goals under this section, subject to the limitations established in this section.

(1) A utility may request that an EECRF be established to recover all of the utility's forecasted annual energy efficiency program costs, if the commission order establishing the utility's base rates does not expressly include an amount for energy efficiency program costs. If a utility's existing base rate order expressly includes an amount for energy efficiency program costs, the utility may request that an EECRF be established to recover forecasted annual energy efficiency program costs in excess of the costs recovered through base rates.

(2) In any base rate case that is filed after December 31, 2007 or is pending on that date, base rates shall not be set to recover energy efficiency costs.

(3) The EECRF shall be calculated to recover the costs associated with each program from the customer classes that receive services under each program.

(4) Each year, a utility with an EECRF shall apply to adjust the EECRF in order to reflect changes in costs and bonuses and minimize any over- or under-collection of energy efficiency costs resulting from the use of the EECRF. The EECRF shall be designed to permit the utility to recover any under-recovery of energy efficiency program costs or return any over-recovery of costs. An application to change an EECRF that will take effect in January of the following year shall be filed not later than May 1.

(5) The EECRF may be changed in a general rate proceeding or, if a general rate proceeding has not been conducted in the preceding year, an electric utility may petition to adjust its EECRF on an annual basis.

(6) The commission may approve an energy charge or a monthly customer charge for the EECRF. The EECRF shall be set at a rate that will give the utility the opportunity to earn revenues equal to the sum of the utility's forecasted energy efficiency costs, net of energy efficiency costs included in base rates, the energy efficiency performance bonus amount that it earned for the prior year under subsection (h) of this section and any adjustment for past over- or under-recovery of energy efficiency revenues.

(7) A utility that is unable to establish an EECRF due to a rate freeze may defer the costs of complying with this section and recover the deferred costs through an energy efficiency cost recovery factor on the expiration of the rate freeze period. Any deferral of costs that are not being recovered in rates shall bear interest at the utility's commission approved cost of capital from the time the costs are incurred until the commission approves an EECRF for the recovery of the costs. A utility that seeks to defer its costs shall file an application for approval of the deferral.

(8) A utility's program expenditures for 2008 shall not exceed 175% of its program budget for 2007 for residential and commercial customers, as included in its April 1, 2006, filing. A utility's program expenditures for 2009 shall not exceed 250% of its program budget for 2007 for residential and commercial customers, as included in the April 1, 2006, filing.

(9) A utility's application to establish or change an EECRF shall include the information and schedules in any commission approved EECRF filing package, but at a minimum shall include testimony and schedules showing the utility's forecasted energy efficiency costs, energy efficiency costs included in base rates, the Energy Efficiency Performance Bonus amount that it earned for the prior year, any adjustment for past over- or under-recovery of energy efficiency revenues, information concerning the calculation of billing determinants, information from its last base rate case concerning the allocation of energy efficiency costs to customer classes, and the following:

(A) the incentive payments by the utility, by program; the utility's administrative costs for its energy efficiency programs for the most recent year and for the year in which the EECRF is expected to be in effect, including costs for the dissemination of information and outreach; and other major administrative costs, and the basis for the projection;

(B) billing determinants for the most recent year and for the year in which the EECRF is expected to be in effect;

(C) the actual revenues attributable to the EECRF for any period for which the utility seeks to adjust the EECRF for an under- or over-recovery of EECRF revenues; and

(D) any other information that supports the determination of the EECRF.

(10) Upon a utility's filing of an application to establish or change an EECRF, the presiding officer shall set a procedural schedule that will enable the commission to issue a final order in the proceeding as follows, except where good cause supports a different procedural schedule:

(A) within 60 days after a sufficient application was filed if no hearing is requested within 30 days of the filing of the application; or

(B) within 120 days after a sufficient application was filed, if a timely request for a hearing is made. If a hearing is requested, the hearing will be held no earlier than the first working day after the 45th day after a sufficient application is filed.

(11) In any proceeding to establish or change an EECRF, the utility must show that:

(A) the costs to be recovered through the EECRF are reasonable estimates of the costs necessary to provide energy efficiency programs and to meet the utility's goals under this section;

(B) calculations of any under- or over-recovery of EECRF revenues is consistent with this section;

(C) any energy efficiency performance bonus for which recovery is being sought is consistent with this section;

(D) the costs assigned or allocated to customer classes are reasonable and consistent with this section;

(E) the estimate of billing determinants for the period for which the EECRF is to be in effect is reasonable; and

(F) any calculations or estimates of system losses and line losses used in calculating the charges are reasonable.

(12) The scope of a proceeding to establish or adjust an EECRF is limited to the issues of whether the utility's cost estimates are reasonable, calculations of under- or over-recoveries are consistent with this section, the calculation of any energy efficiency performance bonus is consistent with this section, the assignments and allocations to the classes are appropriate, and the calculation of the EECRF is in accordance with this subsection. The commission shall make a final determination of the reasonableness of the costs and performance bonuses that the utility recovered through the EECRF.

(13) A utility shall file an application at least every three calendar years to reconcile costs recovered through its EECRF. The commission may establish a schedule and form for such applications.

(g) Incentive payments. The incentive payments for each customer class shall not exceed 100% of avoided cost, as determined in accordance with this section. The incentive payments shall be set by each utility with the objective of achieving its energy and demand savings goals at the lowest reasonable cost per program. Different incentive levels may be established for areas that have historically been underserved by the utility's energy efficiency program or for other appropriate reasons. Utilities may adjust incentive payments during the program year, but such adjustments must be clearly publicized in the materials used by the utility to set out the program rules and describe the program to participating energy efficiency service providers.

(h) Energy efficiency performance bonus. A utility that exceeds its demand reduction goal established in this section at a cost that does not exceed the limit established in this section shall be awarded a performance bonus. The performance bonus shall be based on the utility's energy efficiency achievements for the previous calendar year. The bonus calculation shall not include demand or energy savings that result from programs other than programs implemented under this section.

(1) The performance bonus shall entitle the utility to receive a share of the net benefits realized in meeting its demand reduction goal established in this section.

(2) Net benefits shall be calculated as the sum of total avoided cost associated with the eligible programs administered by the utility minus the sum of all program costs. Total avoided costs shall be calculated in accordance with this section.

(3) A utility that exceeds 100% of its demand reduction goal (DRG) shall receive a bonus equal to 1% of the net benefits for every 2% that the demand reduction goal has been exceeded, with a maximum of a 20% of the utility's program costs.

(4) A utility that meets at least 120% of its demand reduction goal with at least 10% of its savings achieved through Hard-to-Reach programs shall receive an additional bonus equal to 10% of the bonus calculated under paragraph (3) of this subsection.

(5) Any energy or demand savings achieved in 2007 that are applied to a utility's goal in 2008 are not eligible for a performance bonus.

(6) A bonus earned under this section shall not be included in the utility's revenues or net income for the purpose of establishing a utility's rates or commission assessment of its earnings.

(i) Utility administration. The cost of administration may not exceed 10% of a utility's total program costs. Research and development costs shall not exceed 10% of a utility's total program costs. Any bonus awarded by the commission shall not be included in program costs for the purpose of applying these limits.

(1) Administrative costs include all reasonable and necessary costs incurred by a utility in carrying out its responsibilities under this section, including:

(A) conducting informational activities designed to explain the standard offer programs and market transformation programs to energy efficiency service providers, retail electric providers, and vendors;

(B) for utilities outside of ERCOT, providing informational programs to improve customer awareness of energy efficiency programs and measures;

(C) reviewing and selecting energy efficiency programs in accordance with this section;

(D) providing regular and special reports to the commission, including reports of energy and demand savings; and

(E) any other activities that are necessary and appropriate for successful program implementation.

(2) A utility shall adopt measures to foster competition among energy service providers, such as limiting the number of projects or level of incentives that a single energy service provider and its affiliates is eligible for and establishing funding set-asides for small projects.

(3) A utility may establish funding set-asides or other program rules to foster participation in energy efficiency programs by municipalities and other governmental entities.

(4) Electric utilities shall use standardized forms, procedures, deemed savings estimates and program templates. The electric utility shall file any standardized materials, or any change to it, with the commission at least 60 days prior to its use. In filing such materials, the utility shall provide an explanation of changes from the version of the materials that was previously used. The utility shall provide relevant documents to REPs and EESPs and work collaboratively with them when it changes program documents, to the extent that such changes are not considered in the Energy Efficiency Implementation Project described in subsection (q) of this section.

(j) Standard offer programs. A utility's standard offer program shall be implemented through programs rules and standard offer contracts that are consistent with this section. Standard offer contracts will be available to any energy efficiency service provider that satisfies the contract requirements prescribed by the utility under this section and demonstrates that it is capable of managing energy efficiency projects under an electric utility's energy efficiency program.

(k) Market transformation programs. Market transformation programs are strategic efforts, including, but not limited to, incentives and education designed to reduce market barriers for energy efficient technologies and practices. Market transformation programs may be designed to obtain energy savings or peak demand reductions beyond savings that would be achieved through compliance with existing building codes and equipment efficiency standards or standard offer programs. Utilities should cooperate with the REPs, and, where possible, leverage existing industry-recognized programs that have the potential to reduce demand and energy consumption in Texas and consider statewide administration where appropriate. Market transformation programs may operate over a period of more than one year and may demonstrate cost-effectiveness over a period longer than one year.

(l) Requirements for standard offer and market transformation programs. A utility's standard offer and market transformation programs shall meet the requirements of this subsection.

(1) Standard offer and market transformation programs:

(A) shall describe the eligible customer classes and allocate funding among the classes on an equitable basis;

(B) may offer standard incentive payments and specify a schedule of payments that are sufficient to meet the goals of the program, which shall be consistent with this section, or any revised payment formula adopted by the commission. The incentive payments may include both payments for energy and demand savings, as appropriate;

(C) shall not permit the provision of any product, service, pricing benefit, or alternative terms or conditions to be conditioned upon the purchase of any other good or service from the utility, except that only customers taking transmission and distribution services from a utility can participate in its energy efficiency programs;

(D) shall provide for a complaint process that allows:

(i) an energy efficiency service provider to file a complaint with the commission against a utility; and

(ii) a customer to file a complaint with the utility against an energy efficiency service provider;

(E) may permit the use of renewable DSM and combined heat and power technologies, involving installations of ten megawatts or less; and

(F) may require energy efficiency service providers to provide the following:

(i) a description of how the value of any incentive will be passed on to customers;

(ii) evidence of experience and good credit rating;

(iii) a list of references;

(iv) all applicable licenses required under state law and local building codes;

(v) evidence of all building permits required by governing jurisdictions; and

(vi) evidence of all necessary insurance.

(2) Standard offer programs:

(A) shall require energy efficiency service providers to identify peak demand and energy savings for each project in the proposals they submit to the utility;

(B) shall be neutral with respect to specific technologies, equipment, or fuels. Energy efficiency projects may lead to switching from electricity to another energy source, provided that the energy efficiency project results in overall lower energy costs, lower energy consumption, and the installation of high efficiency equipment. Utilities may not pay incentives for a customer to switch from gas appliances to electric appliances except in connection with the installation of high efficiency combined heating and air conditioning systems;

(C) shall require that all projects result in a reduction in purchased energy consumption, or peak demand, or a reduction in energy costs for the end-use customer;

(D) shall encourage comprehensive projects incorporating more than one energy efficiency measure;

(E) shall be limited to projects that result in consistent and predictable energy or peak demand savings over an appropriate period of time based on the life of the measure; and

(F) may permit a utility to use poor performance, including customer complaints, as a criterion to limit or disqualify an energy efficiency service provider or its affiliate from participating in a program.

(3) A market transformation program shall identify:

(A) program goals;

(B) market barriers the program is designed to overcome;

(C) key intervention strategies for overcoming those barriers;

(D) estimated costs and projected energy and capacity savings;

(E) a baseline study that is appropriate in time and geographic region. In establishing a baseline, the study shall consider the level of regional implementation and enforcement of any applicable energy code;

(F) program implementation timeline and milestones;

(G) a description of how the program will achieve the transition from extensive market intervention activities toward a largely self-sustaining market;

(H) a method for measuring and verifying savings; and

(I) the period over which savings shall be considered to accrue, including a projected date by which the market will be sufficiently transformed so that the program should be discontinued.

(4) A market transformation program shall be designed to achieve energy or peak demand savings, or both, and lasting changes in the way energy efficient goods or services are distributed, purchased, installed, or used over a defined period of time.

(5) A load-control standard-offer program shall not permit an energy efficiency service provider to receive incentives under the utility program for the same demand reduction for which it is compensated under a demand response program conducted by an independent organization, independent system operator, or regional transmission operator.

(m) Energy efficiency plans and reports. Each electric utility shall file by April 1 of each year an energy efficiency plan and report, as described in this subsection. The plan and report shall be filed as a single document.

(1) Each electric utility's energy efficiency plan and report shall describe how the utility intends to achieve the goals set forth in this section and comply with the other requirements of this section. The plan and report shall be based on calendar years. The plan and report shall propose an annual budget sufficient to reach the goals specified in this section.

(2) Each electric utility's plan and report shall include:

(A) the utility's total actual and weather-adjusted peak demand and actual and weather-adjusted peak demand for residential and commercial customers for the previous five years;

(B) the demand goal calculated in accordance with this section for the current year and the following year, including documentation of the demand, weather adjustments, and the calculation of the goal;

(C) the utility's customers' total actual and weather-adjusted energy consumption and actual and weather-adjusted energy consumption for residential and commercial customers for the previous five years;

(D) the energy goal calculated in accordance with this section, including documentation of the energy consumption, weather adjustments, and the calculation of the goal;

(E) a description of existing energy efficiency programs and an explanation of the extent to which these programs will be used to meet the utility's energy efficiency goals;

(F) a description of each of the utility's energy efficiency programs that were not included in the previous year's plan, including measurement and verification plans if appropriate, and any baseline studies and research reports or analyses supporting the value of the new programs;

(G) an estimate of the energy and peak demand savings to be obtained through each separate energy efficiency program;

(H) a description of the customer classes targeted by the utility's energy efficiency programs, specifying the size of the hard-to-reach, residential, and commercial classes, and the methodology used for estimating the size of each customer class;

(I) the proposed annual budget required to implement the utility's energy efficiency programs, broken out by program for each customer class, including hard-to-reach customers, and any set-asides or budget restrictions adopted or proposed in accordance with this section. The proposed budget shall detail the incentive payments and utility administrative costs, including specific items for research and information and outreach to energy efficiency service providers, and other major administrative costs, and the basis for estimating the proposed expenditures;

(J) a discussion of the types of informational activities the utility plans to use to encourage participation by energy efficiency service providers and retail electric providers to participate in energy efficiency programs, including the manner in which the utility will provide notice of energy efficiency programs, and any other facts that may be considered when evaluating a program;

(K) the utility's energy goal and demand goal for the prior five years, as reported in annual energy efficiency reports filed in accordance with this section;

(L) a comparison of projected savings (energy and demand), reported savings, and verified savings for each of the utility's energy efficiency programs for the prior two years;

(M) a description of the results of any market transformation program, including a comparison of the baseline and actual results and any adjustments to the milestones for a market transformation program;

(N) expenditures for the prior five years for energy and demand incentive payments and program administration, by program and customer class;

(O) funds that were committed but not spent during the prior year, by program;

(P) a comparison of actual and budgeted program costs, including an explanation of any increase or decreases of more than 10% in the cost of a program;

(Q) information relating to energy and demand savings achieved and the number of customers served by each program by customer class;

(R) the utility's most recent EECRF, the revenue collected through the EECRF, energy efficiency revenue collected through base rates, and the control number under which the most recent EECRF was established;

(S) the amount of any over- or under-recovery energy efficiency program costs whether collected through base rates or the EECRF;

(T) beginning with the report filed in 2009, a list of any counties that in the prior year were under-served by the energy efficiency program; and

(U) a calculation showing whether the utility qualifies for a performance bonus and the amount of any bonus.

(n) Review of programs. An electric utility's energy efficiency program is subject to review, which may be initiated by the commission staff or informal review through the EEIP process. The review under this section may relate to an existing program, proposed new programs, or the failure of the utility to implement a program. The initiation of a formal review of a utility's energy efficiency plan does not preclude the utility from carrying out existing or planned programs, unless a presiding officer or the commission issues an order requiring it to make a change in a program.

(o) Inspection, measurement and verification. Each standard offer program shall include an industry-accepted measurement and verification protocol, such as the International Performance Measurement and Verification Protocol, to measure and verify energy and peak demand savings to ensure that the goals of this section are achieved. An

energy efficiency service provider shall not receive final compensation until it establishes that the work is complete and measurement and verification in accordance with the protocol verifies that the savings will be achieved. If inspection of one or more measures is a part of the protocol, an energy efficiency service provider shall not receive final compensation until the utility has conducted its inspection on the sample of measures and the inspections confirm that the work has been done.

(1) The energy efficiency service provider is responsible for the measurement of energy and peak demand savings using the approved measurement and verification protocol, and may utilize the services of an independent third party for such purposes.

(2) Commission-approved deemed energy and peak demand savings may be used in lieu of the energy efficiency service provider's measurement and verification, where applicable. The deemed savings approved by the commission before December 31, 2007 are continued in effect, unless superseded by commission action.

(3) An energy efficiency service provider shall verify that the measures contracted for were installed before final payment is made to the energy efficiency service provider, by obtaining the customer's signature certifying that the measures were installed, or by other reasonably reliable means approved by the utility.

(4) For projects involving over 30 installations, a statistically significant sample of installations will be subject to on-site inspection in accordance with the protocol for the project to verify that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.

(5) Projects of less than 30 installations may be aggregated and a statistically significant sample of the aggregate installations will be subject to on-site inspection in accordance with the protocol for the projects to ensure that measures are installed and capable of performing their intended function. Inspection shall occur within 30 days of notification of measure installation.

(6) The sample size for on-site inspections may be adjusted for an energy efficiency service provider under a particular contract, based on the results of prior inspections.

(p) Targeted energy efficiency program. Unless funding is provided under PURA §39.903, each unbundled transmission and distribution utility shall include in its energy efficiency plan a targeted low-income energy efficiency program as described by PURA §39.903(f)(2). Savings achieved by the program shall count toward the transmission and distribution utility's energy efficiency goal. Each utility shall include a proposed funding level for the weatherization program in its energy efficiency plan.

(q) Energy Efficiency Implementation Project - EEIP. The commission may use an implementation project involving input by interested persons to make recommendations to the commission with regard to best practices in standard offer programs and market transformation programs, modifications to programs, standardized forms and procedures, deemed savings estimates, program templates, and the overall direction of the energy efficiency program established by this section. The following functions may also be undertaken in the energy efficiency implementation project:

(1) development, discussion, and review of new statewide standard offer programs;

(2) identification, discussion, design, and review of new market transformation programs;

(3) determination of measures for which deemed savings are appropriate and participation in the development of deemed savings estimates for those measures;

(4) review of and recommendations on an independent measurement and verification expert's report;

(5) review of and recommendations on incentive payment levels and their adequacy to induce the desired level of participation by energy efficiency service providers and customers;

(6) review of and recommendations on the utility annual energy efficiency plans and reports;

(7) periodic reviews of the cost effectiveness methodology; and

(8) other activities as requested by the commission.

(r) Retail providers. Each electric utility in the ERCOT region shall conduct outreach and information programs and otherwise use its best efforts to encourage and facilitate the involvement of retail electric providers as energy efficiency service companies in the delivery of efficiency and demand response programs. Electric utilities outside of the ERCOT region shall provide customers with energy efficiency education materials.

(s) Customer protection. Each energy efficiency service provider that provides energy efficiency services to end-use customers under this section shall provide the disclosures and include the contractual provisions required by this subsection, except for commercial customers with a peak load exceeding 50 kW.

(1) Clear disclosure to the customer shall be made of the following:

(A) the customer's right to a cooling-off period of three business days, in which the contract may be canceled, if applicable under law;

(B) the name, telephone number, and street address of the energy efficiency services provider and any subcontractor that will be performing services at the customer's home or business;

(C) the fact that incentives are made available to the energy efficiency services provider through a program funded by utility customers, manufacturers or other entities and the amount of any incentives provided by the utility;

(D) the amount of any incentives that will be provided to the customer;

(E) notice of provisions that will be included in the customer's contract, including warranties;

(F) the fact that the energy efficiency service provider must measure and report to the utility the energy and peak demand savings from installed energy efficiency measures;

(G) the liability insurance to cover property damage carried by the energy efficiency service provider and any subcontractor;

(H) the financial arrangement between the energy efficiency service provider and customer, including an explanation of the total customer payments, the total expected interest charged, all possible penalties for non-payment, and whether the customer's installment sales agreement may be sold;

(I) the fact that the energy efficiency service provider is not part of or endorsed by the commission or the utility; and

(J) a description of the complaint procedure established by the utility under this section, and toll free numbers for the Office of Customer Protection of the Public Utility Commission of Texas, and the Office of Attorney General's Consumer Protection Hotline.

(2) The energy efficiency service provider's contract with the customer shall include:

(A) work activities, completion dates, and the terms and conditions that protect residential customers in the event of non-performance by the energy efficiency service provider;

(B) provisions prohibiting the waiver of consumer protection statutes, performance warranties, false claims of energy savings and reductions in energy costs; and

(C) a complaint procedure to address performance issues by the energy efficiency service provider or a subcontractor.

(3) When an energy efficiency service provider completes the installation of measures for a customer, it shall provide the customer an "All Bills Paid" affidavit to protect against claims of subcontractors.

(t) Grandfathered programs. An electric utility that offered a load management standard offer programs for industrial customers prior to May 1, 2007 shall continue to make the program available, at 2007 funding and participation levels, and may include additional customers in the program to maintain these funding and participation levels. Notwithstanding subsection (c)(7), an industrial customer may be considered an eligible customer for programs that will be completed no later than December 31, 2008.

(u) Administrative penalty. The commission may impose an administrative penalty or other sanction if the utility fails to meet a goal for energy efficiency under this section. Factors that may be considered in determining whether to impose a sanction for the utility's failure to meet the goal include:

(1) the level of demand by retail electric providers and competitive energy service providers for program incentives made available by the utility through its programs;

(2) changes in building energy codes;

(3) changes in national or state appliance or equipment efficiency standards;

(4) any actions taken by the utility to identify and correct any deficiencies in its energy efficiency program; and

(5) the utility's effectiveness in administering its energy efficiency program.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 14, 2008.

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Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
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For further information, please call: (512) 936-7223

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TITLE 19. EDUCATION

PART 2. TEXAS EDUCATION AGENCY

CHAPTER 101. ASSESSMENT

SUBCHAPTER AA. COMMISSIONER'S RULES CONCERNING THE PARTICIPATION OF LIMITED ENGLISH PROFICIENT STUDENTS IN STATE ASSESSMENTS

19 TAC §101.1007, §101.1009

The Texas Education Agency (TEA) adopts amendments to §101.1007 and §101.1009, concerning participation of limited English proficient students in state assessments. The amendment to §101.1007 is adopted without changes to the proposed text as published in the February 8, 2008, issue of the *Texas Register* (33 TexReg 1065) and will not be republished. The amendment to §101.1009 is adopted with a non-substantive revision to the proposed text as published in the February 8, 2008, issue of the *Texas Register*. Section 101.1007 addresses limited English proficient students at grades other than the exit level. Section 101.1009 addresses limited English proficient students who receive special education services. The adopted amendments reflect clarifications on serving students who receive both special language and special education services to correspond with recent changes adopted in 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter BB, Commissioner's Rules Concerning State Plan for Educating Limited English Proficient Students. The adopted amendments also update references to state assessments to reflect recent changes in the state assessment program.

Amendments to 19 TAC Chapter 89, Adaptations for Special Populations, Subchapter BB, Commissioner's Rules Concerning State Plan for Educating Limited English Proficient Students, adopted to be effective September 17, 2007, included clarification on serving students who receive both special language and special education services. The adopted amendments clarify that the admission, review, and dismissal (ARD) committee and language proficiency assessment committee (LPAC) shall work in conjunction in the testing and classification of students who are designated as limited English proficient (LEP) and receive special education services.

The adopted amendments to 19 TAC Chapter 101, Assessment, Subchapter AA, Commissioner's Rules Concerning the Participation of Limited English Proficient Students in State Assessments, reflect the changes made in 19 TAC Chapter 89, Subchapter BB. In addition, the adopted amendments update references to state assessments to reflect recent changes in the state assessment program.

The adopted amendment to 19 TAC §101.1007, Limited English Proficient Students at Grades Other Than the Exit Level, includes a technical update in subsection (b)(1) to reference English language proficiency assessments in reading.

The adopted amendment to 19 TAC §101.1009, Limited English Proficient Students Who Receive Special Education Services, revises language in subsections (b) and (c) to clarify that the ARD committee and LPAC shall work in conjunction to make decisions regarding the selection of state assessments and testing accommodations for a LEP student served by special education to ensure that factors related to both the student's second language acquisition needs and disabling condition are considered. Guidance for meeting the requirement that the ARD committee

and LPAC work in conjunction has been issued by the TEA Department of Standards and Programs. The adopted amendment also updates the reference to the state assessments in subsection (d) to reflect recent changes in the state assessment program.

In response to a public comment, TEA has made a non-substantive revision to §101.1009(c) for clarity and consistency.

The TEA has determined that the adopted amendments will have no adverse economic impact for small businesses and microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period began February 8, 2008, and ended March 9, 2008. Following is a summary of the public comment received and corresponding agency response regarding the proposed amendments to 19 TAC Chapter 101, Assessment, Subchapter AA, Commissioner's Rules Concerning the Participation of Limited English Proficient Students in State Assessments.

Comment. Concerning §101.1009, Limited English Proficient Students Who Receive Special Education Services, an individual requested that the agency consider keeping the current policy in effect. The individual commented that requiring the inclusion of the entire LPAC would unduly burden the process, which currently includes input from a representative of the LPAC. In addition, the individual commented that the inclusion of the entire LPAC in the decision-making process might raise confidentiality concerns.

Agency Response. The TEA disagrees in part and agrees in part. The TEA disagrees that the current policy should remain in effect. It is necessary to revise §101.1009 to make clear that the ARD committee works in conjunction with the LPAC to reach decisions on assessment-related matters for LEP students who receive special education services just as the two committees work in conjunction in the testing and classification of these students under 19 TAC Chapter 89.

The TEA does agree, however, that concerns expressed in the individual's comment are legitimate, and the TEA Department of Standards and Programs has issued guidance to respond to these concerns. According to the guidance issued, key members of the ARD committee and key members of the LPAC are to collaborate in considering the needs of the students. Recommendations from these collaborative efforts are presented by key members of the LPAC and are discussed at ARD committee meetings. This guidance responds both to the concern about the inclusion of the entire LPAC and the concern about confidentiality. The TEA has made a non-substantive revision to §101.1009(c) since published as proposed to ensure consistency between the language of the rule and the language of the guidance issued. Specifically, language was updated to reflect that the ARD committee would work in conjunction with the LPAC.

The amendments are adopted under the Texas Education Code, §39.023, which authorizes the commissioner of education to adopt rules concerning the exemption of limited English proficient students from the administration of assessment instruments.

The amendments implement the Texas Education Code, §39.023.

§101.1009. Limited English Proficient Students Who Receive Special Education Services.

(a) The provisions of this subchapter apply to limited English proficient (LEP) students who receive special education services except as otherwise specified in this section.

(b) The admission, review, and dismissal (ARD) committee in conjunction with the language proficiency assessment committee (LPAC) shall make decisions regarding the selection of assessments and appropriate accommodations for LEP students who receive special education services.

(c) A LEP student who receives special education services may be exempted from the English language proficiency assessments required by §101.1001 of this title (relating to English Language Proficiency Assessments) only if the ARD committee in conjunction with the LPAC determines that these assessments cannot provide a meaningful measure of the student's annual growth in English language proficiency for reasons associated with the student's disability.

(d) The provisions of §101.1007(b) and (c) of this title (relating to Limited English Proficient Students at Grades Other Than the Exit Level) apply to the state's general and alternate assessments of academic skills.

(e) A LEP student who receives special education services and whose parent or guardian has declined the services required by the Texas Education Code, Chapter 29, Subchapter B, is not eligible for an exemption on the basis of limited English proficiency.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 21, 2008.

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Cristina De La Fuente-Valadez
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For further information, please call: (512) 475-1497

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CHAPTER 103. HEALTH AND SAFETY
SUBCHAPTER BB. COMMISSIONER'S RULES CONCERNING GENERAL PROVISIONS FOR HEALTH AND SAFETY

19 TAC §103.1101

The Texas Education Agency (TEA) adopts new §103.1101, concerning automated external defibrillator (AED) reimbursement. The new section is adopted without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 1949) and will not be republished. The adopted new section implements requirements of the Texas Education Code (TEC), §38.017, added by Senate Bill 7, and the General Appropriations Act, House Bill 1, 80th Texas Legislature, 2007.

TEC, §38.017, Availability of Automated External Defibrillator, requires each school district and open-enrollment charter school to make an AED device available on each campus. The General Appropriations Act, Article IX, Section 19.86, 2007, authorizes the commissioner of education to adopt rules as necessary to implement a program to reimburse school districts and open-enrollment charter schools for costs associated with the purchase

of AED devices. Accordingly, the commissioner exercises rulemaking authority to address provisions relating to the reimbursement program for AED devices. Adopted new 19 TAC §103.1101 establishes the following procedures relating to AED reimbursements.

Subsection (a) specifies that a campus that demonstrates priority and need will be reimbursed for one AED device. Each campus that did not have an AED device as of June 1, 2007, will be reimbursed for one AED device per campus that was purchased between June 1, 2007, and June 30, 2008. The subsection also sets forth the definition of "campus" for the purpose of AED reimbursement and establishes priority and need.

Subsection (b) adopts in rule the reimbursement application form that must be submitted to the TEA and establishes that applicants for reimbursement must include verification of the AED device purchase.

Subsection (c) specifies that each reimbursement will be for the actual amount paid for the AED device or a maximum of $1,475, whichever is less.

Subsection (d) establishes that the availability of funds after reimbursements are made to school districts and open-enrollment charter schools will determine whether reimbursements will be made to private schools.

Subsection (e) clarifies that any donated AED device or AED device purchased with funds donated for such purchase is ineligible for reimbursement.

No changes were made to the AED reimbursement application form adopted as rule since published as proposed.

The TEA has determined that the adopted new section will have no adverse economic impact to small businesses or microbusinesses; therefore, no regulatory flexibility analysis, specified in Texas Government Code, §2006.002, is required.

The public comment period began on March 7, 2008, and ended April 6, 2008. Following is a summary of public comments received and corresponding agency responses regarding the proposed new 19 TAC Chapter 103, Health and Safety, Subchapter BB, Commissioner's Rules Concerning General Provisions for Health and Safety, §103.1101, Automated External Defibrillator (AED) Reimbursement.

Comment. Concerning the AED purchase date requirement of June 1, 2007 - June 30, 2008, the assistant superintendent for personnel and auxiliary services of the Nederland Independent School District (ISD) requested that the program be expanded to include districts that purchased AED devices prior to June 1, 2007.

Agency Response. The agency disagrees and has maintained language as published as proposed. The General Appropriations Act, House Bill 1, 80th Texas Legislature, 2007, allocated not more than $9 million to the TEA in fiscal year 2008 to reimburse school districts and open-enrollment charter schools for costs associated with the purchase of AED devices, giving funding priority based on greatest need. The AED reimbursement program was contingent upon the passage of Senate Bill 7, 80th Texas Legislature, 2007. Senate Bill 7 was passed and took immediate effect in June 2007. The agency cannot reimburse AED expenditures prior to June 2007, when the program was created. The agency determined that it could conclude that AED devices purchased after June 1, 2007, were purchased in response to Senate Bill 7, now codified as TEC, §38.017.

Comment. The executive director of operations at Rockwall ISD commented in support of the proposal.

Agency Response. The agency agrees.

The new section is adopted under the General Appropriations Act, House Bill 1, 80th Texas Legislature, 2007, Article IX, Section 19.86, which authorizes the commissioner of education to adopt rules as necessary to implement a program to reimburse school districts and open-enrollment charters for costs associated with the purchase of AED devices.

The proposed new section implements the General Appropriations Act, House Bill 1, 80th Texas Legislature, 2007, Article IX, Section 19.86, and Texas Education Code, §38.017.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802067
Cristina De La Fuente-Valadez
Director, Policy Coordination
Texas Education Agency
Effective date: May 11, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 475-1497

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TITLE 22. EXAMINING BOARDS

PART 11. TEXAS BOARD OF NURSING

CHAPTER 217. LICENSURE, PEER ASSISTANCE AND PRACTICE

22 TAC §217.19, §217.20

The Texas Board of Nursing (BON) adopts without changes the repeal of 22 Texas Administrative Code §217.19 (Incident-Based Nursing Peer Review), and §217.20 (Safe Harbor Peer Review for Nurses). The proposed repeals were published in the February 15, 2008, edition of the *Texas Register* (33 TexReg 1222). The Board is concurrently adopting new rules to replace the repealed sections.

Senate Bill 993 (relating to nursing peer review) from the 2007 legislative session implemented new changes to the peer review process, so the BON based on a recommendation by its Nursing Practice Advisory Committee, adopts the repeal of the existing peer review rules in order to address these changes. Concurrent with these repeals, the BON adopts new rules addressing peer review, safe harbor, and whistleblower protections.

No comments were received in response to the proposals.

The adoption is pursuant to the authority of Texas Occupations Code §301.151 which authorizes the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802085
Katherine Thomas
Executive Director
Texas Board of Nursing
Effective date: May 11, 2008
Proposal publication date: February 15, 2008
For further information, please call: (512) 305-6823

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22 TAC §217.19, §217.20

The Texas Board of Nursing (BON or board) adopts new §217.19, concerning Incident-Based Nursing Peer Review and Whistleblower Protections, and §217.20, concerning Safe Harbor Peer Review. The new rules are adopted with changes to the proposed text as published in the February 15, 2008, issue of the *Texas Register* (33 TexReg 1222).

Concurrent with these adopted new rules are the adopted repeals of the existing rules. The changes adopted by the Board are editorial and for the purpose of clarifying the original proposed language. For purposes of consistency and clarification, changes were made in §217.19 to: subsection (a)(1) - definition of assignment is changed to read like the definition of assignment in §217.20; subsection (d)(2)(A) - remove phrase "paragraph (3)(F) of" and leave it as "required by this subsection"; subsection (e)(6) - delete phrase "to remediate a nurse for one or more minor incidents" as the chair person has broader authority than this phrase denotes; subsection (f)(1) and (2) - move the "or" from paragraph (1) to paragraph (2); subsection (g)(4) - add to the phrase "reporting the nurse to the Board" the additional phrase "or a Board-approved peer assistance program" and correct the reference to "paragraph (2)" to "paragraph (1)"; and change subsection (m)(2)(B)(i) and (ii) to subsection (m)(3) and (4). Finally, in §217.20(d)(4)(A)(iii), remove the last sentence regarding a nurse's refusal to engage in requested conduct or an assignment, because this issue is repeated and more clearly addressed in §217.20(d)(4)(A)(iv).

At the July 2007 BON meeting, the board charged the Nursing Practice Advisory Committee (NPAC) with the task of revising the nursing peer review rules. The peer review process is outlined in Texas Occupations Code, Chapter 303, Nursing Peer Review. Reporting requirements are found in Texas Occupations Code, Chapter 301 (Nursing Practice Act).

Senate Bill 993, addressing nursing peer review, added protections for a nurse who reports a nurse, refuses to engage in conduct, or assists a nurse with filing safe harbor because of unsafe conditions for patients. This includes not only protections for the nurse claiming safe harbor or reporting another nurse, but also for the nurse reporting a facility or non-nurse health care provider who the nurse believes in good faith is endangering patient safety. These "whistleblower" protections have been added at the end of each rule, as well as included in the titles for each rule, to assure that nurses are able to easily find and be aware that they do have these protections when upholding their duty to always advocate for patient safety (§217.11(1)(B)).

With regard to Safe Harbor Peer Review (§217.20), besides arranging the rule for better flow and understanding, additions include addressing the nurse's due process rights, and providing for a nurse to do a brief "initial" request for safe harbor at the time asked to engage in the conduct, with provision to complete the more detailed request later in the same work period but prior to leaving the work area.

The rules were originally proposed in the November 2, 2007, issue of the *Texas Register* (32 TexReg 7845), but due to extensive comments and recommendations made to the first proposed new peer review rules, during the January 2008 board meeting, the board approved several substantive changes in response to comments, primarily to §217.20, and moved to withdraw (33 TexReg 1087) and re-propose the new peer review rules.

Two comments were received in response to the proposal. Texas Nurses Association (TNA) submitted a comment in support of the proposed rules, and one individual expressed some concerns.

Comment: Regarding §217.19(a) and §217.20(a), the commenter asked if the list of committees contained within the definition of "Patient Safety Committee" (in both rules) was intended to be exclusive with regard to the specified entities, or if the intent was "including but not limited to"? An additional concern/comment added to this question was that "permitting a hospital to completely control a patient safety committee is tantamount to a self evaluation which is completely subjective; the likelihood of a self report to a licensing or accrediting body is unlikely."

Response: In both rules, paragraph (13) Patient Safety Committee, subpargraphs (A) and (B) come straight from the statute language in §303.0075 of the Nursing Peer Review Law (NPR). The Nursing Practice Advisory Committee (NPAC) added proposed language in subparagraph (C) to include provision for "a multi-disciplinary team that includes nursing representation or any committee established by the same entity to promote best practices and patient safety, may apply as appropriate."

A number of national patient safety organizations have promoted the utilization of multi-disciplinary teams to remedy system breakdowns relating to patient safety initiative for several years. Examples include the Institute of Safe Medication Practices, http://www.ismp.org, the Agency for Healthcare Research and Quality, http://www.ahrq.gov/, and the Joint Commission, http://www.jointcommission.org/.

The board believes the NPAC proposed language in subparagraph (C) makes it clear that there is no limitation strictly to the entities listed in the definition. The term "patient safety committee" itself is seen as a generic term used legislatively since it would be impossible to know the names of every committee active within a given setting to investigate error events and recommend changes appropriate to the setting.

The BON does not regulate hospitals or practice settings of any kind; therefore, the BON has no authority to mandate who "controls the patient safety committee." The BON's jurisdiction extends up to the Chief Nursing Officer (CNO), nurse administrator, or top nursing position by any other title. A CNO, nurse administrator or other nurse in a similar nursing leadership position can be reported to the BON and investigated for failing to assure that peer review processes are conducted in good faith. Recommend no changes to proposed rule language.

Comment: Regarding §217.19(a)(17) and §217.20(a)(17), the commenter states that "Whistleblower protections need to be strengthened; penalties for a hospitals' refusal to give a nurse safe harbor peer review (beyond reporting the DON or CNE to the BON) should be considered. Otherwise, the Board will be inundated with complaints that an already overburdened staff would have to deal with."

Response: As noted in an earlier BON response, the BON does not regulate hospitals or practice settings of any kind; therefore, the BON has no authority to propose sanctions on a facility, agency, or other employer of nurses. The NPA also prohibits board members and staff from lobbying the Texas Legislature regarding bills that would amend the parts of the Texas Occupations Code relating to the practice of nursing. Nurses are encouraged to work through their professional organizations, as these organizations can lobby the Legislature for bills that can impact work setting and employment issues for nurses. The BON does not have the authority to amend the rules as suggested in this comment. No changes will be made to proposed rule language.

Comment: Regarding §217.19(a)(5) and §217.20(a)(5), the commenter states concern for the language in the BON's definition of "duty to a patient" regarding the phrase *"and to avoid engaging in unprofessional conduct (§217.12 of this title).*" Commenter states that "Notwithstanding the fact that the Nurse Practice Act (Texas Occupations Code §301.352) specifically addresses refusal of unsafe assignments, the proposed language arguably dilutes the statute by Rule, conjoining the §217.11 (Standards of Nursing Practice) obligations with an unprofessional conduct requirement."

Response: The BON believes the above perception of the proposed rule language is inaccurate. In both incident-based and safe harbor situations, a nursing peer review committee could find that they are dealing with a situation where either a nurse has knowingly engaged in unprofessional conduct (such as stealing from a patient), or where a nurse has invoked safe harbor because he/she was directed to engage in unprofessional conduct (such as falsifying a patient's medical record). The BON expects a nurse to avoid engaging in conduct that could cause harm to the patient. The Board further believes the distinction of when a nurse would be justified in refusing an assignment is sufficiently addressed in §217.20(g). No changes will be made to proposed rule language.

Comment: Regarding §217.20(g), the commenter states concern that this section "essentially requires that the nurse take the assignment and artificially limits her ability to refuse in accordance with the statute Texas Occupations Code §310.352 and with §217.11(1)(T)." A further comment on this topic speaks to the lack of a definition for "unjustifiable risk of harm" in relation to the nurse's duty to maintain client safety when considering a nursing assignment and concern that rule language "obscures" the findings of a landmark court case *Lunsford vs. BNE.*

Response: NPAC suggested language in §217.20(g) provides clarification for what the BON considers to be "good faith" reasons for refusing to engage in requested conduct or an assignment. The BON believes this language is important to differentiate and provide guidance to nurses with regard to when it is appropriate to refuse versus to accept the first offered assignment when invoking safe harbor.

Take the situation in which a nurse had her license sanctioned by the BON for invoking Safe Harbor in "bad faith" and not only refusing to engage in conduct, but leaving the facility. In this instance, neither the acuity or number of patients assigned on the nurse's home unit exceeded levels routinely handled by nurses in the practice setting. Despite the nursing supervisor obtaining additional staff, the nurse refused the assignment and left the premises, leaving nursing colleagues who were tired after working for 12 hours, to continue caring for expectant mothers and their unborn infants.

Applying the above example to the proposed rule section in question, §217.20(g)(2)(A) would require the nurse refusing the assignment to "...collaborate in an attempt to identify an acceptable assignment that is within the nurse's scope and enhances the delivery of safe patient care." The rule does not mandate the nurse accept an assignment but rather directs that the nurse must at least communicate his/her concerns with the supervisor, and that the supervisor, in turn, must try to address the issue both nurses acting in the best interest of patient safety (§217.11(1)(B)). In other words, simply handing the safe harbor form to the supervisor and walking out is not acceptable or considered acting in "good faith."

What constitutes "unjustifiable risk of harm" cannot be defined in rule as it will vary in every practice setting and situation. This highlights the premise of safe harbor to have a peer review committee of nurses from the practice setting in question review the conduct requested when a nurse invokes safe harbor. Who better than other nurses from the same practice setting to make an accurate determination of the nurse's "duty" and what would constitute "unjustifiable risk of harm"? A nursing peer review committee must consider the nurse's duty under §217.11(1)(B), which is further described in relation to the *Lunsford vs. BNE* landmark case in Board Position Statement 15.14, Duty of a Nurse in Any Setting, at http://www.bon.state.tx.us/practice/position.html#15.14.

In addition, the comments received demonstrate the risks of taking part of a board rule, i.e. §217.20(j)(4), out of context. Section 217.20(j)(4)(A) - (D) clarify that even if a CNO/nurse administrator disagrees with the determination of the peer review committee, this does not nullify the nurse's protections from employer retaliation set forth in NPR Law §303.005(c) relating to either a nurse's refusal to engage in certain conduct under Nursing Practice Act (NPA) §301.352, or for requesting a Safe Harbor Peer Review determination. The subsections further list required actions of the CNO if he/she takes action not supported by the peer review committee's findings.

Additionally, NPA statutes, §301.405(b) and §301.403, clearly indicate separate reporting requirements for peer review and the nurse's employer. Given the multitude of sections in the statute and proposed rules, including §217.20(j)(4)(D), that prohibit employer retaliation, the only reason a CNO or nurse administrator could differ with the safe harbor peer review committee's findings would be if he/she believed the nurse did not invoke safe harbor in good faith, in which case a report to the board would be required under §217.11(1)(K) and potentially §301.405(b) depending upon the employment action taken. No changes will be made to proposed rule language.

Comment: Commenter states that "Safe Harbor is no protection for loss of license, employment, or civil liability." Further statements address concerns for rule language regarding peer review committee determinations being non-binding if the CNO or nurse administrator believe in good faith that the committee has incorrectly determined a nurse's duty.

Response: First, language regarding the decision of peer review being non-binding on the CNO or nurse administrator has been in the NPA, §303.005(d), for many years as well as in the current Safe Harbor, 22 TAC §217.20 (2003). The BON cannot change or ignore statute.

The statute in NPA §301.352, mentioned earlier in the commenter's letter, does provide a nurse with civil recourse should the nurse's employer engage in retaliatory action with regard

to the nurse's employment for invoking Safe Harbor or refusing to engage in conduct that violates the statutes or board rules. Senate Bill 993 (the same bill that initiated the current proposed changes to the peer review rules) did strengthen a nurse's protection from employer retaliation. Current NPA §301.413, and NPR Law §303.005(c), (d), and (h), along with proposed §217.20(e)(2) - (3) and (i)(3) address the prohibition of retaliatory action by an employer against the nurse who either invokes safe harbor or refuses in good faith to engage in conduct that the nurse believes could violate his/her duty to a patient. As the BON does not regulate employment issues or practice settings, the BON has no authority to impose any penalty on an employer. This is, and always has been, a private civil matter for the nurse to pursue.

As for civil liability protection for the nurse, this also is and always has been beyond the authority of the BON's regulations. The language in the new rules does not, and cannot, impact civil liability.

With regard to Commenter's statement that "safe harbor is no protection for loss of license," this is factually incorrect. Both past and current statutes and rules on Safe Harbor have provided the nurse protection against BON licensure sanctions, including revocation, provided the nurse invoked Safe Harbor in good faith. The BON would be lax in its mission to protect the public if it approved rule language that unequivocally exonerated a nurse for refusing an assignment without regard to the nurse's intent to engage in unprofessional conduct versus upholding his/her duty to the patient. In addition, board statutes and rules relating to procedural due process with regard to investigation of alleged violations of the NPA and board rules further provide a nurse the opportunity to demonstrate good faith efforts to comply with BON statutes and rules. No changes will be made to proposed rule language.

The new rules are adopted pursuant to the authority of Texas Occupations Code §301.151 which authorizes the BON to adopt, enforce, and repeal rules consistent with its legislative authority under the Nursing Practice Act.

§217.19. Incident-Based Nursing Peer Review and Whistleblower Protections.

(a) Definitions.

(1) Assignment--Designated responsibility for the provision or supervision of nursing care for a defined period of time in a defined work setting. This includes but is not limited to the specified functions, duties, practitioner orders, supervisory directives, and amount of work designated as the individual nurse's responsibility. Changes in the nurse's assignment may occur at any time during the work period.

(2) Bad Faith--Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(3) Chief Nursing Officer (CNO)--The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses.

(4) Conduct Subject to Reporting defined by Texas Occupations Code (TOC) §301.401 of the Nursing Practice Act as conduct by a nurse that:

(A) violates the Nursing Practice Act (NPA) or a Board rule and contributed to the death or serious injury of a patient;

(B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;

(C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

(5) Duty to a patient--A nurse's duty is to always advocate for patient safety, including any nursing action necessary to comply with the standards of nursing practice (§217.11 of this title) and to avoid engaging in unprofessional conduct (§217.12 of this title). This includes administrative decisions directly affecting a nurse's ability to comply with that duty.

(6) Good Faith--Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(7) Incident-Based Peer Review--Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to five (5) minor incidents by the same nurse within a year's period of time) should be reported to the Board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable.

(8) Malice--Acting with a specific intent to do substantial injury or harm to another.

(9) Minor incident--Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16 of this title.

(10) Nurse Administrator--Chief Nursing Officer (CNO) or the CNO's designee.

(11) Nursing Peer Review Law (NPR Law)--Chapter 303 of the TOC. Nurses involved in nursing peer review must comply with the NPR Law.

(12) Nursing Practice Act (NPA)--Chapter 301 of the TOC. Nurses must comply with the NPA.

(13) Patient Safety Committee--Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety including:

(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, TOC §§151.001, et seq.);

(B) a medical committee under Chapter 161, Subchapter D of the Health and Safety Code (§§161.031 - 161.033); or

(C) a multi-disciplinary committee, including nursing representation, or any committee established by the same entity to promote best practices and patient safety.

(14) Peer Review--Defined by TOC §303.001(5) (NPR Law) as the evaluation of nursing services, the qualifications of a

nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.

(15) Safe Harbor--A process that protects a nurse from employer retaliation and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

(16) Texas Occupations Code (TOC)--One of the topical subdivisions or "codes" into which the Texas Statutes or laws are organized. The TOC contains the statutes governing occupations and professions including the health professions. Both the NPA and NPR Law are located within these statutes. The TOC can be changed only by the Texas Legislature.

(17) Whistleblower Protections--Protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse:

(A) made a good faith request for Safe Harbor Nursing Peer Review under TOC §303.005(c) (NPR Law) and §217.20 of this title;

(B) refused to engage in an act or omission relating to patient care that would constitute a violation of the NPA or Board rules as permitted by TOC §301.352 (NPA) (Protection for Refusal to Engage in Certain Conduct). A nurse invoking Safe Harbor under §217.20 of this title must comply with §217.20(g) of this title if the nurse refuses to engage in the conduct or assignment; or

(C) made a lawful report of unsafe practitioners, or unsafe patient care practices or conditions, in accordance with TOC §301.4025 (NPA) (report of unsafe practices of non-nurse entities) and subsection (j)(2) of this section.

(b) Purpose. The purpose of this rule is to:

(1) define minimum due process to which a nurse is entitled under incident-based peer review;

(2) provide guidance to facilities, agencies, schools, or anyone who utilizes the services of nurses in the development and application of incident-based peer review plans;

(3) assure that nurses have knowledge of the plan; and

(4) provide guidance to the incident-based peer review committee in its fact finding process.

(c) Applicability of Incident-Based Peer Review. TOC §303.0015 (NPR Law) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to conduct nursing peer review for purposes of TOC §301.402(e) (NPA) (relating to alternate reporting by nurses to peer review), §301.403 (relating to peer review committee reporting), §301.405(c) (relating to peer review of external factors as part of employer reporting), and §301.407(b) (relating to alternate reporting by state agencies to peer review).

(d) Minimum Due Process.

(1) A licensed nurse subject to incident-based peer review is entitled to minimum due process under TOC §303.002(e) (NPR Law). Any person or entity that conducts incident-based peer review must comply with the due process requirements of this section even if the person or entity does not utilize the number of nurses described by subsection (c) of this section.

(2) A facility conducting incident-based peer review shall have written policies and procedures that, at a minimum, address:

(A) the level of participation of nurse or nurse's representative at an incident-based peer review hearing beyond that required by this subsection;

(B) confidentiality and safeguards to prevent impermissible disclosures including written agreement by all parties to abide by TOC §§303.006, 303.007, 303.0075 (NPR Law) and subsection (h) of this section;

(C) handling of cases involving nurses who are impaired or suspected of being impaired by chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity in accordance with the TOC §301.410, and subsection (g) of this section;

(D) reporting of nurses to the Board by incident-based peer review committee in accordance with the TOC §301.403, and subsection (i) of this section; and

(E) effective date of changes to the policies which in no event shall apply to incident-based peer review proceedings initiated before the change was adopted unless agreed to in writing by the nurse being reviewed.

(3) In order to meet the minimum due process required by TOC Chapter 303 (NPR Law), the nursing peer review committee must:

(A) comply with the membership and voting requirements as set forth in TOC §303.003 (NPR Law);

(B) exclude from the committee, including attendance at the peer review hearing, any person or persons with administrative authority for personnel decisions directly relating to the nurse. This requirement does not exclude a person who is administratively responsible over the nurse being reviewed from appearing before the committee to speak as a fact witness;

(C) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility that:

(i) the nurse's practice is being evaluated;

(ii) the incident-based peer review committee will meet on a specified date not sooner than 21 calendar days and not more than 45 calendar days from date of notice, unless:

(I) the incident-based peer review committee determines an extended time period (extending the 45 days by no more than an additional 45 days) is necessary in order to consult with a patient safety committee; or

(II) otherwise agreed upon by the nurse and incident-based peer review committee; and

(iii) includes the information required by subparagraph (D) of this paragraph.

(D) Include in the notice required by subparagraph (C) of this paragraph:

(i) a description of the event(s) to be evaluated in sufficient detail to inform the nurse of the incident, circumstances and conduct (error or omission), including date(s), time(s), location(s), and individual(s) involved. The patient/client shall be identified by initials or number to the extent possible to protect confidentiality but the nurse shall be provided the name of the patient/client;

(ii) the name, address, telephone number of contact person to receive the nurse's response; and

(iii) a copy of this rule (§217.19 of this title) and a copy of the facility's incident-based peer review plan, policies and procedures.

(E) provide the nurse the opportunity to review, in person or by attorney, the documents concerning the event under review, at least 15 calendar days prior to appearing before the committee;

(F) provide the nurse the opportunity to:

(i) submit a written statement regarding the event under review;

(ii) call witnesses, question witnesses, and be present when testimony or evidence is being presented;

(iii) be provided copies of the witness list and written testimony or evidence at least 48 hours in advance of proceeding;

(iv) make an opening statement to the committee;

(v) ask questions of the committee and respond to questions of the committee; and

(vi) make a closing statement to the committee after all evidence is presented;

(G) complete its review no more than fourteen (14) calendar days after the incident-based peer review hearing, or in compliance with subparagraph (C)(ii) of this paragraph relating to consultation with a patient safety committee;

(H) provide written notice to the nurse in person or by certified mail at the last known address the nurse has on file with the facility of the findings of the committee within ten (10) calendar days of when the committee's review has been completed; and

(I) permit the nurse to file a written rebuttal statement within ten (10) calendar days of the notice of the committee's findings and make the statement a permanent part of the incident-based peer review record to be included whenever the committee's findings are disclosed;

(4) An incident-based peer review committee's determination to report a nurse to the Board cannot be overruled, changed, or dismissed.

(5) Nurse's Right to Representation.

(A) A nurse shall have a right of representation as set out in this paragraph. These rights are minimum requirements and a facility may allow the nurse more representation. The incident-based peer review process is not a legal proceeding; therefore, rules governing legal proceedings and admissibility of evidence do not apply and the presence of attorneys is not required.

(B) The nurse has the right to be accompanied to the hearing by a nurse peer or an attorney. Representatives attending the incident-based peer review hearing must comply with the facility's incident-based peer review policies and procedures regarding participation beyond conferring with the nurse.

(C) If either the facility or nurse will have an attorney or representative present at the incident-based peer review hearing in any capacity, the facility or nurse must notify the other at least seven (7) calendar days before the hearing that they will have an attorney or representative attending the hearing and in what capacity.

(D) Notwithstanding any other provisions of these rules, if an attorney representing the facility or incident-based peer review committee is present at the incident-based peer review hearing in any capacity, including serving as a member of the incident-based peer review committee, the nurse is entitled to "parity of participation of counsel." "Parity of participation of counsel" means that the nurse's attorney is able to participate to the same extent and level as the facility's attorney, e.g., if the facility's attorney can question witnesses, the nurse's attorney must have the same right.

(6) A nurse whose practice is being evaluated may properly choose not to participate in the proceeding after the nurse has been notified under paragraph (3)(C) of this subsection. If a nurse elects not to participate in incident-based peer review, the nurse waives any right to procedural due process under TOC §303.002 (NPR Law) and this subsection.

(e) Use of Informal Work Group In Incident Based Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing incident-based peer review committee provided there are written policies for the informal workgroup that require:

(1) the nurse be informed of how the informal work group will function, and consent, in writing, to the use of an informal work group. A nurse does not waive any right to incident-based peer review by accepting or rejecting the use of an informal work group;

(2) if the informal work group suspects that the nurse's practice is impaired by chemical dependency or diminished mental capacity, the chair person must be notified to determine if peer review should be terminated and the nurse reported to the Board or to a Board-approved peer assistance program as required by subsection (g) of this section;

(3) the informal work group comply with the membership and voting requirements of subsection (d)(3)(A) and (B) of this section;

(4) the nurse be provided the opportunity to meet with the informal work group;

(5) the nurse have the right to reject any decision of the informal work group and to then have his/her conduct reviewed by the peer review committee, in which event members of the informal work group shall not participate in that determination; and

(6) ratification by the committee chair person of any decision made by the informal work group. If the chair person disagrees with a determination of the informal work group, the chair person shall convene the full peer review committee to make a determination regarding the conduct in question; and

(7) the chair person communicate any decision of the informal work group to the CNO or nurse administrator.

(f) Exclusions to Minimum Due Process Requirements. The minimum due process requirements set out in subsection (d) of this section do not apply to:

(1) peer review conducted solely in compliance with TOC §301.405(c) (NPA) relating to review of external factors, after a report of a nurse to the Board has already occurred under TOC §301.405(b) (relating to mandatory report by employer, facility or agency);

(2) reviews governed by subsection (g) of this section involving nurses whose practice is suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity; or

(3) when a person required to report a nurse believes that a nurse's practice is impaired or suspected of being impaired and has also resulted in a violation under TOC §301.410(b), that requires a direct report to the Board.

(g) Incident-Based Peer Review of a Nurse's Impaired Practice/Lack of Fitness.

(1) When a nurse's practice is impaired or suspected of being impaired due to chemical dependency, drug or alcohol abuse, substance abuse/misuse, "intemperate use," mental illness, or diminished mental capacity, peer review of the nurse shall be suspended. The nurse shall be reported to the Board or to a Board-approved peer assistance program in accordance with TOC §301.410 (related to reporting of impairment):

(A) if there is no reasonable factual basis for determining that a practice violation is involved, the nurse shall be reported to:

(i) the Board; or

(ii) a Board-approved peer assistance program, that shall handle reporting the nurse in accordance with §217.13 of this title; or

(B) if there is a reasonable factual basis for a determination that a practice violation is involved, the nurse shall be reported to the Board.

(2) Following suspension of peer review of the nurse, the committee shall proceed to evaluate external factors to determine if:

(A) any factors beyond the nurse's control contributed to a practice violation; and

(B) any deficiency in external factors enabled the nurse to engage in unprofessional or illegal conduct.

(3) If the committee determines under paragraph (2) of this subsection that external factors do exist for either paragraph (2)(A) or (B) of this subsection, the committee shall report its findings to a patient safety committee or to the CNO or nurse administrator if there is no patient safety committee.

(4) A facility, organization, contractor, or other entity does not violate a nurse's right to due process under subsection (d) of this section by suspending the committee's review of the nurse and reporting the nurse to the Board or a Board-approved peer assistance program in accordance with paragraph (1) of this subsection.

(5) Paragraph (1) of this subsection does not preclude a nurse from self-reporting to a peer assistance program or appropriate treatment facility.

(h) Confidentiality of Proceedings.

(1) Confidentiality of information presented to and/or considered by the incident-based peer review committee shall be maintained and the information not disclosed except as provided by TOC §§303.006, 303.007, and 303.0075 (NPR Law). Disclosure/discussion by a nurse with the nurse's attorney is proper because the attorney is bound to the same confidentiality requirements as the nurse.

(2) In accordance with TOC §303.0075, a nursing incident-based peer review committee, including an entity contracted to conduct peer review under TOC §303.0015(b), and any patient safety committee established by the same entity, may share information.

(A) A record or determination of a patient safety committee, or a communication made to a patient safety committee, is not subject to subpoena or discovery and is not admissible in any civil or administrative proceeding, regardless of whether the information has been provided to a nursing peer review committee.

(B) The privileges under this subsection may be waived only through a written waiver signed by the chair, vice chair, or secretary of the patient safety committee.

(C) This section does not affect the application of TOC §303.007 (NPR Law) (relating to disclosures by peer review committee) to a nursing peer review committee.

(D) A committee that receives information from another committee shall forward any request to disclose the information to the committee that provided the information.

(3) A CNO or Nurse Administrator shall assure that policies are in place relating to sharing of information and documents between an Incident-Based Nursing Peer Review committee and a patient safety committee(s) that at a minimum, address:

(A) separation of confidential Incident-Based Nursing Peer Review information from the nurse's human resource file;

(B) methods in which shared communications and documents are labeled and maintained as to which committee originated the documents or communications;

(C) the confidential and separate nature of incident-based peer review and patient safety committee proceedings including shared information and documents; and

(D) the treatment of nurses who violate the policies including when a violation may result in a nurse being reported to the Board or a nursing peer review committee.

(i) Committee Responsibility to Evaluate and Report.

(1) In evaluating a nurse's conduct, the incident-based peer review committee shall review the evidence to determine the extent to which any deficiency in care by the nurse was the result of deficiencies in the nurse's judgment, knowledge, training, or skill rather than other factors beyond the nurse's control. A determination that a deficiency in care is attributable to a nurse must be based on the extent to which the nurse's conduct was the result of a deficiency in the nurse's judgment, knowledge, training, or skill.

(2) An incident-based peer review committee shall consider whether a nurse's conduct constitutes one or more minor incidents under §217.16 of this title. In accordance with that section, the committee may determine that the nurse:

(A) can be remediated to correct the deficiencies identified in the nurse's judgment, knowledge, training, or skill; or

(B) should be reported to the Board for either a pattern of practice that fails to meet minimum standards, or for one or more events that the incident-based peer review committee determines cannot be categorized as a minor incident(s).

(3) An incident-based nursing peer review committee is not required to submit a report to the Board if:

(A) the committee determines that the reported conduct was a minor incident that is not required to be reported in accordance with provisions of §217.16 of this title; or

(B) the nurse has already been reported to the Board under TOC §301.405(b) (NPA) (employer reporting requirements).

(4) If the committee determines it is required to report a nurse to the Board, the committee shall submit to the Board a written, signed report that includes:

(A) the identity of the nurse;

(B) a description of the conduct subject to reporting;

(C) a description of any corrective action taken against the nurse;

(D) a recommendation as to whether the Board should take formal disciplinary action against the nurse, and the basis for the recommendation;

(E) the extent to which any deficiency in care provided by the reported nurse was the result of a factor beyond the nurse's control; and

(F) any additional information the Board requires.

(5) If an incident-based peer review committee determines that a deficiency in care by the nurse was the result of a factor(s) beyond the nurse's control, in compliance with TOC §303.011(b) (NPR Law) (related to required peer review committee report when external factors contributed to a nurse's deficiency in care), the committee must submit a report to the applicable patient safety committee, or to the CNO or nurse administrator if there is no patient safety committee. A patient safety committee must report its findings back to the incident-based peer review committee.

(6) An incident-based peer review committee is not required to withhold its determination of the nurse being incident-based peer reviewed, pending feedback from a patient safety committee, unless the committee believes that a determination from a patient safety committee is necessary in order for the incident-based peer review committee to determine if the nurse's conduct is reportable.

(A) If an incident-based peer review committee finds that factors outside the nurse's control contributed to a deficiency in care, in addition to reporting to a patient safety committee, the incident-based peer review committee may also make recommendations for the nurse, up to and including reporting to the Board.

(B) An incident-based peer review committee may extend the time line for completing the incident-based peer review process (extending the 45 days by no more than an additional 45 days) if the committee members believe they need input from a patient safety committee. The incident-based peer review committee must complete its review of the nurse within this 90-day time frame.

(7) An incident-based peer review committee's determination to report a nurse to the Board cannot be overruled, changed, or dismissed.

(j) Nurse's Duty to Report.

(1) A report made by a nurse to a nursing incident-based peer review committee will satisfy the nurse's duty to report to the Board under TOC §301.402 (mandatory report by a nurse) provided that the following conditions are met:

(A) The reporting nurse shall be notified of the incident-based peer review committee's actions or findings and shall be subject to TOC §303.006 (confidentiality of peer review proceedings); and

(B) The nurse has no reason to believe the incident-based peer review committee made its determination in bad faith.

(2) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for filing a report made without malice under this section and TOC §301.402(f) (retaliation for a report made without malice prohibited). A violation of this subsection or TOC §301.402(f) is subject to TOC §301.413 that provides a nurse the right to file a civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

(k) State Agency Duty to Report. A state agency that has reason to believe that a nurse has engaged in conduct subject to reporting shall report the nurse in writing to:

(1) the Board; or

(2) the applicable nursing peer review committee in lieu of reporting to Board.

(l) Integrity of Incident-Based Peer Review Process.

(1) Incident-Based Peer Review must be conducted in good faith. A nurse who knowingly participates in incident-based peer review in bad faith is subject to disciplinary action by the Board.

(2) The CNO or nurse administrator of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this rule and for taking reasonable steps to assure that incident-based peer review is implemented and conducted in compliance with the NPA, NPR Law, and this section.

(3) A determination by an incident-based peer review committee, a CNO, nurse administrator, or an individual nurse to report a nurse to the Board cannot be overruled, dismissed, changed, or reversed. An incident-based peer review committee, CNO, and individual nurse each have a separate responsibility to protect the public by reporting a nurse to the Board as set forth in TOC §§301.402, 301.405, 217.11(1)(K) of this title, and this section.

(m) Reporting Conduct of other Practitioners or Entities: Whistleblower Protections.

(1) This section does not expand the authority of any incident-based peer review committee or the Board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing Board or accrediting body, and in accordance with TOC §301.4025 (report of unsafe practices of non-nurse entities), a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or

(B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

(3) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

(4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this subsection. A violation of this subsection is subject to TOC §301.413 (NPA) that provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint

with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

§217.20. Safe Harbor Peer Review.

(a) Definitions.

(1) Assignment--Designated responsibility for the provision or supervision of nursing care for a defined period of time in a defined work setting. This includes but is not limited to the specified functions, duties, practitioner orders, supervisory directives, and amount of work designated as the individual nurse's responsibility. Changes in the nurse's assignment may occur at any time during the work period.

(2) Bad Faith--Knowingly or recklessly taking action not supported by a reasonable factual or legal basis. The term includes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity towards the nurse, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(3) Chief Nursing Officer (CNO)--The registered nurse, by any title, who is administratively responsible for the nursing services at a facility, association, school, agency, or any other setting that utilizes the services of nurses.

(4) Conduct Subject to Reporting defined by Texas Occupations Code (TOC) §301.401 of the Nursing Practice Act as conduct by a nurse that:

(A) violates the Nursing Practice Act (NPA) or a Board rule and contributed to the death or serious injury of a patient;

(B) causes a person to suspect that the nurse's practice is impaired by chemical dependency or drug or alcohol abuse;

(C) constitutes abuse, exploitation, fraud, or a violation of professional boundaries; or

(D) indicates that the nurse lacks knowledge, skill, judgment, or conscientiousness to such an extent that the nurse's continued practice of nursing could reasonably be expected to pose a risk of harm to a patient or another person, regardless of whether the conduct consists of a single incident or a pattern of behavior.

(5) Duty to a patient--A nurse's duty is to always advocate for patient safety, including any nursing action necessary to comply with the standards of nursing practice (§217.11 of this title) and to avoid engaging in unprofessional conduct (§217.12 of this title). This includes administrative decisions directly affecting a nurse's ability to comply with that duty.

(6) Good Faith--Taking action supported by a reasonable factual or legal basis. Good faith precludes misrepresenting the facts surrounding the events under review, acting out of malice or personal animosity, acting from a conflict of interest, or knowingly or recklessly denying a nurse due process.

(7) Incident-Based Peer Review--Incident-based peer review focuses on determining if a nurse's actions, be it a single event or multiple events (such as in reviewing up to five (5) minor incidents by the same nurse within a year's period of time) should be reported to the Board, or if the nurse's conduct does not require reporting because the conduct constitutes a minor incident that can be remediated. The review includes whether external factors beyond the nurse's control may have contributed to any deficiency in care by the nurse, and to report such findings to a patient safety committee as applicable.

(8) Malice--Acting with a specific intent to do substantial injury or harm to another.

(9) Minor incident--Conduct by a nurse that does not indicate that the nurse's continued practice poses a risk of harm to a patient or another person as described in §217.16 of this title.

(10) Nurse Administrator--Chief Nursing Officer (CNO) or the CNO's designee.

(11) Nursing Peer Review Law (NPR law)--Chapter 303 of the TOC. Nurses involved in nursing peer review must comply with the NPR Law.

(12) Nursing Practice Act (NPA)--Chapter 301 of the TOC. Nurses must comply with the NPA.

(13) Patient Safety Committee--Any committee established by an association, school, agency, health care facility, or other organization to address issues relating to patient safety including:

(A) the entity's medical staff composed of individuals licensed under Subtitle B (Medical Practice Act, TOC §151.001, et seq);

(B) a medical committee under Subchapter D, Chapter 161 of the Health and Safety Code (§§161.031 - 161.033); or

(C) a multi-disciplinary committee, including nursing representation, or any committee established by the same entity to promote best practices and patient safety.

(14) Peer Review--Defined by TOC §303.001(5) (NPR Law) as the evaluation of nursing services, the qualifications of a nurse, the quality of patient care rendered by a nurse, the merits of a complaint concerning a nurse or recommendation regarding a complaint. The peer review process is one of fact finding, analysis and study of events by nurses in a climate of collegial problem solving focused on obtaining all relevant information about an event. Peer review conducted by any entity must comply with NPR Law and with applicable Board rules related to incident-based or safe harbor peer review.

(15) Safe Harbor--A process that protects a nurse from employer retaliation and licensure sanction when a nurse makes a good faith request for peer review of an assignment or conduct the nurse is requested to perform and that the nurse believes could result in a violation of the NPA or Board rules. Safe Harbor must be invoked prior to engaging in the conduct or assignment for which peer review is requested, and may be invoked at anytime during the work period when the initial assignment changes.

(16) Texas Occupations Code (TOC)--One of the topical subdivisions or "codes" into which the Texas Statutes or laws are organized. The TOC contains the statutes governing occupations and professions including the health professions. Both the NPA and NPR Law are located within these statutes. The TOC can be changed only by the Texas Legislature.

(17) Whistleblower Protections--Protections available to a nurse that prohibit retaliatory action by an employer or other entity because the nurse:

(A) made a good faith request for Safe Harbor Nursing Peer Review under TOC §303.005(c) and this section; or

(B) refused to engage in an act or omission relating to patient care that would constitute a violation of the NPA or Board rules as permitted by TOC §301.352 (NPA) (Protection for Refusal to Engage in Certain Conduct). A nurse invoking Safe Harbor under this section must comply with subsection (g) of this section if the nurse refuses to engage in the conduct or assignment; or

(C) made a lawful report of unsafe practitioners, or unsafe patient care practices or conditions, in accordance with TOC §301.4025 (report of unsafe practices of non-nurse entities) and §217.19(j)(2) of this title.

(b) Purpose. The purpose of this rule is to:

(1) define the process for invoking Safe Harbor;

(2) define minimum due process to which a nurse is entitled under safe harbor peer review;

(3) provide guidance to facilities, agencies, employers of nurses, or anyone who utilizes the services of nurses in the development and application of peer review plans;

(4) assure that nurses have knowledge of the plan as well as their right to invoke Safe Harbor; and

(5) provide guidance to the peer review committee in making its determination of the nurse's duty to the patient.

(c) Applicability of Safe Harbor Nursing Peer Review.

(1) TOC §303.0015 (NPR Law) requires a person who regularly employs, hires or contracts for the services of ten (10) or more nurses (for peer review of an RN, at least 5 of the 10 must be RNs) to permit a nurse to request Safe Harbor Peer Review when the nurse is requested or assigned to engage in conduct that the nurse believes is in violation of his/her duty to a patient.

(2) Any person or entity that conducts Safe Harbor Nursing Peer Review is required to comply with the requirements of this rule.

(d) Invoking Safe Harbor.

(1) Safe Harbor must be invoked prior to engaging in the conduct or assignment and at any of the following times:

(A) when the conduct is requested or assignment made;

(B) when changes occur in the request or assignment that so modify the level of nursing care or supervision required compared to what was originally requested or assigned that a nurse believes in good faith that patient harm may result; or

(C) when the nurse refuses to engage in the requested conduct or assignment.

(2) The nurse must notify the supervisor requesting the conduct or assignment in writing that the nurse is invoking Safe Harbor. The content of this notification must meet the requirements for a Quick Request Form described in paragraph (3) of this subsection. A detailed written account of the Safe Harbor request that meets the minimum requirements for the Comprehensive Written Request described in paragraph (4) of this subsection must be completed before leaving the work setting at the end of the work period.

(3) Quick Request Form.

(A) A nurse wishing to invoke Safe Harbor must make an initial request in writing that at a minimum includes the following:

(i) the nurse(s) name making the safe harbor request and his/her signature(s);

(ii) the date and time of the request;

(iii) the location of where the conduct or assignment is to be completed;

(iv) the name of the person requesting the conduct or making the assignment; and

(v) a brief explanation of why safe harbor is being requested.

(B) The BON Safe Harbor Quick Request Form may be used to invoke the initial request for Safe Harbor, but use of the form is not required. The initial written request may be in any written format provided the above minimum information is provided.

(4) Comprehensive Written Request for Safe Harbor Peer Review.

(A) A nurse who invokes Safe Harbor must supplement the initial written request under paragraph (3)(A) of this subsection by submitting a comprehensive request in writing before leaving the work setting at the end of the work period. This comprehensive written request must include a minimum of the following information:

(i) the conduct assigned or requested, including the name and title of the person making the assignment or request;

(ii) a description of the practice setting, e.g., the nurse's responsibilities, resources available, extenuating or contributing circumstances impacting the situation;

(iii) a detailed description of how the requested conduct or assignment would have violated the nurse's duty to a patient or any other provision of the NPA and Board Rules. If possible, reference the specific standard (§217.11 of this title) or other section of the NPA and/or Board rules the nurse believes would have been violated.

(iv) If applicable, the rationale for the nurse's not engaging in the requested conduct or assignment awaiting the nursing peer review committee's determination as to the nurse's duty. The rationale should refer to one of the justifications described in subsection (g)(2) of this section for not engaging in the conduct or assignment awaiting a peer review determination.

(v) any other copies of pertinent documentation available at the time. Additional documents may be submitted to the committee when available at a later time; and

(vi) the nurse's name, title, and relationship to the supervisor making the assignment or request.

(B) The BON Comprehensive Request for Safe Harbor Form may be used when submitting the detailed request for Safe Harbor, but use of the form is not required. The comprehensive written request may be in any written format provided the above minimum information is included.

(5) The nurse invoking Safe Harbor is responsible for keeping a copy of the request for Safe Harbor.

(6) A nurse may invoke Safe Harbor to question the medical reasonableness of a physician's order in accordance with TOC §303.005(e) (NPR Law). In this situation, the medical staff or medical director shall determine whether the order was reasonable.

(e) Safe Harbor Protections.

(1) To activate protections outlined in TOC §303.005(c) and paragraph (2) of this subsection, the nurse shall:

(A) invoke Safe Harbor in good faith;

(B) notify the supervisor in writing that he/she intends to invoke Safe Harbor in accordance with subsection (d) of this section. This must be done prior to engaging in the conduct or assignment for which safe harbor is requested and at any of the following times:

(i) when the conduct is requested or assignment made;

(ii) when changes occur in the request or assignment that so modify the level of nursing care or supervision required compared to what was originally requested or assigned that a nurse believes in good faith that patient harm may result; or

(iii) when the nurse refuses to engage in the requested conduct or assignment.

(2) TOC §303.005(c) and (h) (NPR Law), provide the following protections:

(A) A nurse may not be suspended, terminated, or otherwise disciplined or discriminated against for requesting Safe Harbor in good faith.

(B) A nurse or other person may not be suspended, terminated, or otherwise disciplined or discriminated against for advising a nurse in good faith of the nurse's right to request a determination, or of the procedures for requesting a determination.

(C) A nurse is not subject to being reported to the Board and may not be disciplined by the Board for engaging in the conduct awaiting the determination of the peer review committee as permitted by subsection (g) of this section. A nurse's protections from disciplinary action by the Board for engaging in the conduct or assignment awaiting peer review determination remain in place for 48 hours after the nurse is advised of the peer review committee's determination. This time limitation does not affect the nurse's protections from retaliation by the facility, agency, entity or employer under TOC §303.005(h) (NPR Law) for requesting Safe Harbor.

(3) If retaliation occurs, TOC §301.413 (NPA) provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint with the appropriate regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

(4) Safe Harbor protections do not apply to any civil action for patient injury that may result from the nurse's practice.

(f) Exclusions to Safe Harbor Protections.

(1) A nurse's protections from disciplinary action by the Board under subsection (e)(2) of this section do not apply to:

(A) the nurse who invokes Safe Harbor in bad faith;

(B) conduct the nurse engages in prior to the request for Safe Harbor; or

(C) conduct unrelated to the reason for which the nurse requested Safe Harbor.

(2) If the peer review committee determines that a nurse has engaged in conduct subject to reporting that is not related to the request for Safe Harbor, the committee must comply with the requirements of §217.19 of this title.

(g) Nurse's Right to Refuse to Engage in Certain Conduct Pending Nursing Safe Harbor Peer Review Determination.

(1) A nurse invoking safe harbor may engage in the requested conduct or assignment while awaiting peer review determination unless the conduct or assignment is one in which:

(A) the nurse lacks the basic knowledge, skills, and abilities that would be necessary to render the care or engage in the conduct requested or assigned at a minimally competent level such that engaging in the requested conduct or assignment would expose one or more patients to an unjustifiable risk of harm; or

(B) the requested conduct or assignment would constitute unprofessional conduct and/or criminal conduct such as fraud, theft, patient abuse, exploitation, or falsification.

(2) If a nurse refuses to engage in the conduct or assignment because it is beyond the nurse's scope as described under paragraph (1)(A) of this subsection:

(A) the nurse and supervisor must collaborate in an attempt to identify an acceptable assignment that is within the nurse's scope and enhances the delivery of safe patient care; and

(B) the results of this collaborative effort must be documented in writing and maintained in peer review records by the chair of the peer review committee.

(h) Minimum Due Process.

(1) A person or entity required by TOC §303.005(i) to provide nursing peer review shall adopt and implement a policy to inform nurses of their right to request a nursing peer review committee determination (Safe Harbor Nursing Peer Review) and the procedure for making a request.

(2) In order to meet the minimum due process required by TOC Chapter 303, the nursing peer review committee shall:

(A) comply with the membership and voting requirements as set forth in TOC §303.003;

(B) exclude from the committee membership, any persons or person with administrative authority for personnel decisions directly affecting the nurse;

(C) limit attendance at the Safe Harbor Nursing Peer Review hearing by a CNO, nurse administrator, or other individual with administrative authority over the nurse, including the individual who requested the conduct or made the assignment, to appearing before the safe harbor peer review committee to speak as a fact witness; and

(D) Permit the nurse requesting safe harbor to:

(i) appear before the committee;

(ii) ask questions and respond to questions of the committee; and

(iii) make a verbal and/or written statement to explain why he or she believes the requested conduct or assignment would have violated a nurse's duty to a patient.

(i) Safe Harbor Timelines.

(1) The Safe Harbor Nursing Peer Review committee shall complete its review and notify the CNO or nurse administrator within 14 calendar days of when the nurse requested Safe Harbor.

(2) Within 48 hours of receiving the committee's determination, the CNO or nurse administrator shall review these findings and notify the nurse requesting safe harbor of both the committee's determination and whether the administrator believes in good faith that the committee's findings are correct or incorrect.

(3) The nurse's protection from disciplinary action by the Board for engaging in the conduct or assignment awaiting peer review determination expires 48 hours after the nurse is advised of the peer review committee's determination. The expiration of this protection does not affect the nurse's protections from retaliation by the facility, agency, entity or employer under TOC §303.005(h) for requesting Safe Harbor.

(j) General Provisions.

(1) The Chief Nursing Officer (CNO) or nurse administrator of a facility, association, school, agency, or of any other setting that utilizes the services of nurses is responsible for knowing the requirements of this Rule and for taking reasonable steps to assure that peer review is implemented and conducted in compliance with the NPA and the NPR law.

(2) Safe Harbor Nursing Peer Review must be conducted in good faith. A nurse who knowingly participates in nursing peer review in bad faith is subject to disciplinary action by the Board.

(3) The peer review committee and participants shall comply with the confidentiality requirement of TOC §303.006 and §303.007 relating to confidentiality and limited disclosure of peer review information.

(4) If a nurse requests a Safe Harbor Peer Review determination under TOC §303.005(b) and refuses to engage in the requested conduct or assignment pending the safe harbor peer review, the determinations of the committee are not binding if the CNO or nurse administrator believes in good faith that the committee has incorrectly determined a nurse's duty.

(A) In accordance with TOC §303.005(d), the determination of the safe harbor peer review committee shall be considered in any decision by the nurse's employer to discipline the nurse for the refusal to engage in the requested conduct.

(B) If the CNO or nurse administrator in good faith disagrees with the committee's determination, the rationale for disagreeing must be recorded and retained with the peer review records.

(C) If the CNO or nurse administrator believes the peer review was conducted in bad faith, she/he has a duty to report the nurses involved under TOC §301.402 (NPA) and §217.11(1)(K) of this title.

(D) This section does not affect the protections under TOC §303.005(c)(1) and §301.352 relating to a nurse's protection from disciplinary action or discrimination for making a request for Safe Harbor Peer Review.

(k) Use of Informal Work Group In Safe Harbor Nursing Peer Review. A facility may choose to initiate an informal review process utilizing a workgroup of the nursing peer review committee provided that the final determination of the nurse's duty complies with the time lines set out in this rule and there are written policies for the informal workgroup that require:

(1) the nurse to:

(A) be informed how the informal workgroup will function and that the nurse does not waive any right to peer review by accepting or rejecting the use of an informal workgroup; and

(B) consent, in writing, to the use of an informal workgroup;

(2) the informal workgroup to comply with the membership and voting requirements of subsection (h) of this section;

(3) the nurse to be provided the opportunity to meet with the informal workgroup;

(4) the nurse to have the right to reject any decision of the informal workgroup and have the entire committee determine if the requested conduct or assignment violates the nurse's duty to the patient(s), in which event members of the informal workgroup shall not participate in that determination;

(5) ratification by the safe harbor peer review committee chair person of any decision made by the informal workgroup. If the chair person disagrees with a determination of the informal workgroup, the chair person shall convene the full peer review committee to review the conduct in question; and

(6) the peer review chair person communicate any decision of the informal work group to the CNO or nurse administrator.

(l) Reporting Conduct of other Practitioners or Entities; Whistleblower Protections.

(1) This subsection does not expand the authority of any safe harbor peer review committee or the Board to make determinations outside the practice of nursing.

(2) In a written, signed report to the appropriate licensing Board or accrediting body, and in accordance with TOC §301.4025, a nurse may report a licensed health care practitioner, agency, or facility that the nurse has reasonable cause to believe has exposed a patient to substantial risk of harm as a result of failing to provide patient care that conforms to:

(A) minimum standards of acceptable and prevailing professional practice, for a report made regarding a practitioner; or

(B) statutory, regulatory, or accreditation standards, for a report made regarding an agency or facility.

(3) A nurse may report to the nurse's employer or another entity at which the nurse is authorized to practice any situation that the nurse has reasonable cause to believe exposes a patient to substantial risk of harm as a result of a failure to provide patient care that conforms to minimum standards of acceptable and prevailing professional practice or to statutory, regulatory, or accreditation standards. For purposes of this subsection, an employer or entity includes an employee or agent of the employer or entity.

(4) A person may not suspend or terminate the employment of, or otherwise discipline or discriminate against, a person who reports, without malice, under this section. A violation of this subsection is subject to TOC §301.413 that provides a nurse the right to file civil suit to recover damages. The nurse may also file a complaint with the regulatory agency that licenses or regulates the nurse's practice setting. The BON does not have regulatory authority over practice settings or civil liability.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 21, 2008.

TRD-200802086
Katherine Thomas
Executive Director
Texas Board of Nursing
Effective date: May 11, 2008
Proposal publication date: February 15, 2008
For further information, please call: (512) 305-6823

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PART 16. TEXAS BOARD OF PHYSICAL THERAPY EXAMINERS

CHAPTER 329. LICENSING PROCEDURE

22 TAC §329.5

The Texas Board of Physical Therapy Examiners adopts amendments to §329.5, concerning Licensing Procedures for Foreign-

Trained Applicants, without changes to the proposed text as published in the March 7, 2008, issue of the *Texas Register* (33 TexReg 1954). The amendments make it easier for foreign-trained applicants to apply for an exception to the required score for the CBT Test of Spoken English. They also align the number of professional education hours required by the Board with the standards set by the Federation of State Boards of Physical Therapy in the Coursework Evaluation Tool.

The amendments allow applicants to use physical therapists licensed in the U.S. rather than Texas to attest to their abilities to communicate in English. They also increase the amount of professional education required to 90 hours, the minimum number required to accredited PT programs in the U.S.

No comments were received regarding the proposed amendments.

The amendments are adopted under the Physical Therapy Practice Act, Title 3, Subtitle H, Chapter 453, Texas Occupations Code, which provides the Texas Board of Physical Therapy Examiners with the authority to adopt rules consistent with this Act to carry out its duties in administering this Act.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 16, 2008.

TRD-200801982
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Effective date: May 6, 2008
Proposal publication date: March 7, 2008
For further information, please call: (512) 305-6900

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TITLE 30. ENVIRONMENTAL QUALITY

PART 1. TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

CHAPTER 37. FINANCIAL ASSURANCE

SUBCHAPTER I. FINANCIAL ASSURANCE FOR PETROLEUM UNDERGROUND STORAGE TANK SYSTEMS

30 TAC §§37.825, 37.830, 37.835, 37.840, 37.845, 37.855, 37.867, 37.870, 37.885

The Texas Commission on Environmental Quality (agency, commission, or TCEQ) adopts amendments to §§37.825, 37.830, 37.835, 37.840, 37.845, 37.855, 37.870, and 37.885. The commission also adopts new §37.867.

Sections 37.825, 37.830, 37.835, 37.840, 37.845, 37.855, 37.870 and 37.885, and new 37.867 are adopted *without changes* to the proposed text as published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9527) and will not be republished.

BACKGROUND AND SUMMARY OF THE FACTUAL BASIS FOR THE ADOPTED RULES

The primary purpose of the adopted amendments is to incorporate into agency rules, changes to statute which were effective September 1, 2007, based on language in House Bill (HB) 1956, 80th Legislature, 2007.

SECTION BY SECTION DISCUSSION

Subchapter I. Financial Assurance for Petroleum Underground Storage Tank Systems

Existing §§37.825, 37.830, 37.835, 37.840, 37.845, and 37.855 are being amended to clarify and simplify the figures containing the required wordings for each of these financial assurance mechanisms. Each amended figure will now clearly indicate that each mechanism is covering both corrective action and compensating third parties for bodily injury and property damage caused by accidental releases as is already required by rule. Prior to December 22, 1998, corrective action coverage in many situations could be provided by using the State's Reimbursement Fund, meaning the owner or operator may have only been required to provide financial assurance for third party liability claims. Accordingly, existing mechanism wordings require mechanism providers to indicate which of the coverages was provided. Since that date, owners or operators are required to provide financial assurance for both types of coverage. The adopted wordings should limit confusion by mechanism providers as to which language should be included.

In addition, the adopted mechanism wording requirements will require that the TCEQ facility identification number be reflected on each mechanism for Texas located facilities. This change will more clearly associate the coverage provided with an individual facility and greatly assist the agency's ability to monitor financial assurance.

Finally, wording of the Chief Financial Officer's Letter in the adopted amendment to §37.825 have been changed to require disclosure of the fiscal year-end date for the most recent audited financial statements upon which the financial test is based. This will help ensure that the test is prepared using current financial information.

New §37.867 is adopted to comply with passage of HB 1956, which added a new subsection (e-2) to Texas Water Code (TWC), §26.352. TWC, §26.352(e-2) states the following: "The owner or operator of a tank for which insurance coverage or other financial assurance has terminated shall dispose of any regulated substance in the tank at a properly licensed facility not later than the 90th day after the coverage terminates, unless the owner or operator provides the commission proof that the owner or operator maintains evidence of financial responsibility as required under Subsection (a)."

Adopted new §37.867 implements TWC, §26.352(e-2), while adding clarifications of how it will interact with existing agency rules. Adopted new §37.867(a) uses the term "empty" while placing the term "dispose" in subsection (b). This is intended to clarify the statutory requirement in TWC, §26.352(e-2) that regulated substances be "disposed of," so that it is clear that valuable petroleum product need not necessarily be sent to a waste disposal facility, when there may be a more productive course of action available, such as selling it back to a distributor, or to some other licensed transporter. The rule clarifies that the primary intent is simply that the tank be properly emptied. However, if the regulated substance is disposed of, then disposal must be done in accordance with all applicable requirements.

Adopted §37.867(c) addresses how the new section interacts with existing financial assurance requirements. Most importantly, the new rule does not create a "90-day window" where a tank owner/operator is exempt from the basic requirement of maintaining financial assurance. Rather, §37.867 addresses the specific issue of tanks being empty, by stating that tanks must be emptied by the 90th day after coverage terminates. The exception to this requirement would be that the owner or operator has re-obtained acceptable financial assurance within the 90-day period. A tank owner or operator could still have a general financial assurance violation during the 90-day period, but he or she would not receive a citation under §37.867 until after the 90-day period.

Adopted §37.867(d) addresses how the new rule interacts with existing §37.885. Tank owners or operators may avail themselves of this provision as they would have in the past, with the exception that they are still required to follow adopted §37.867 by ensuring that the tanks are empty within 90 days of financial assurance termination. For tank owners or operators where financial assurance has not terminated, existing §334.54 still applies: tanks may remain properly temporarily removed from service, with fuel in the tanks, indefinitely.

Adopted §37.867(e) ensures that the section as a whole does not affect the commission's authority to require a shutdown of a facility under TWC, §26.3475(e), nor any other sections, rules, or statutes, with regard to financial assurance.

In accordance with passage of HB 1956, this rulemaking adoption amends §37.870(b) to require that owners or operators of Underground Storage Tanks (USTs) must attach to the agency's self-certification form the appropriate document which constitutes evidence of current financial assurance, i.e., for example, an insurance certificate. Currently, tank owners or operators merely sign the self-certification form which contains a declaration that they have current financial assurance.

This rulemaking adoption also amends §37.885 to clarify the circumstances under which an owner or operator is released from financial assurance requirements. The insertion of the phrase "properly temporarily removed from service, in accordance with the requirements of §334.54 of this title (relating to Temporary Removal from Service)" does not create a new substantive requirement. Rather, it is a clarification of existing language which used the phrase "removed from service" without specifying whether reference was being made to temporary or permanent removal from service, or both. The existing interpretation has been that reference was being made to both: either form of removal from service, if done properly, would release an owner or operator from financial assurance requirements.

Finally, §37.885 is amended to add subsection (b), which states that in order to be released from financial assurance requirements under this section, the owner or operator must notify the commission of the change in status in accordance with §334.7. This notification is not a new requirement; rather, it is a clarification of something that is already required under §§334.54(e)(2), 334.55(f)(1), and 334.7(d)(1)(B). A tank owner or operator who is nearing the end of his or her financial assurance term, but intends to close operations and no longer use his or her tanks, would need to comply with the removal from service provisions and notify the commission, before the tank owner or operator would be released from financial assurance requirements.

FINAL REGULATORY IMPACT ANALYSIS DETERMINATION

The commission reviewed the rulemaking in light of the regulatory impact analysis requirements of Texas Government Code, §2001.0225, and determined that the rulemaking is not subject to Texas Government Code, §2001.0225 because it does not meet the definition of a "major environmental rule" as defined in that statute. A major environmental rule means a rule the specific intent of which is to protect the environment or reduce risks to human health from environmental exposure and that may adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state. Although the specific intent of this rule is to "protect the environment" by tightening regulations which ensure that there are private funds available for clean up and liability for releases from underground storage tanks, the second prong of the definition of a "major environmental rule" is not met: The adopted rules would not adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment, or the public health and safety of the state or a sector of the state.

Further, it does not meet any of the four requirements listed in Texas Government Code, §2001.0225(a). Texas Government Code, §2001.0225(a) states: "This section applies only to a major environmental rule adopted by a state agency, the result of which is to: 1) exceed a standard set by federal law, unless the rule is specifically required by state law; 2) exceed an express requirement of state law, unless the rule is specifically required by federal law; 3) exceed a requirement of a delegation agreement or contract between the state and an agency or representative of the federal government to implement a state and federal program; or 4) adopt a rule solely under the general powers of the agency instead of under a specific state law." These adopted rules do not meet any of the four applicability requirements and thus are not subject to the regulatory analysis provisions of Texas Government Code, §2001.0225 even if they did meet the definition of a major environmental rule. Specifically, the adopted rules are required by state law, are not adopted solely under the general powers of the agency, and do not exceed a requirement of state law, federal law, or a delegation agreement or contract between the state and an agency or representative of the federal government.

The commission invited public comments of the draft regulatory impact analysis determination during the public comment period. No comments were received on the draft regulatory impact analysis.

TAKINGS IMPACT ASSESSMENT

The commission evaluated the adopted rules and performed an assessment of whether Texas Government Code, Chapter 2007 is applicable. The commission's assessment indicates that Texas Government Code, Chapter 2007 does not apply to these adopted rules because this is an action that is taken in response to a real and substantial threat to public health and safety; that is designed to significantly advance the health and safety purpose; that does not impose a greater burden than is necessary to achieve the health and safety purpose. Thus, this action is exempt under Texas Government Code, §2007.003(b)(13).

The adopted rules are an "action taken in response to a real and substantial threat to public health and safety" in that contamination from releases from underground storage tanks pose a threat to both soils and groundwater with which the public may come into contact. The adopted rules are "designed to significantly advance the health and safety purpose" by tightening regulations

that ensure that private funds are available for addressing contamination from releases from underground storage tanks. The adopted rules "do not impose a greater burden than is necessary to achieve the health and safety purpose" because they are narrowly tailored to the class of tank owners or operators and narrowly tailored to specific conditions or events, such as termination of financial assurance coverage.

Nevertheless, the commission further evaluated these adopted rules and performed an assessment of whether these adopted rules constitute a taking under Texas Government Code, Chapter 2007. The adopted rules implement HB 1956, which amended TWC, §26.352, concerning Financial Responsibility.

Promulgation and enforcement of the adopted rules would be neither a statutory nor a constitutional taking of private real property by the commission. Specifically, the adopted rules do not affect a landowner's rights in private real property because this rulemaking does not burden (constitutionally) nor restrict or limit the owner's rights to property and reduce its value by 25% or more beyond that which would otherwise exist in the absence of the adopted rules. There are no burdens imposed on private real property from these adopted rules and the benefits to society are the adopted rules' specific procedures and requirements for ensuring that underground storage tanks have financial assurance coverage. As a whole, this rulemaking will not constitute a taking under Texas Government Code, Chapter 2007.

CONSISTENCY WITH THE COASTAL MANAGEMENT PROGRAM

The commission reviewed the adopted rulemaking and found the adoption is a rulemaking identified in the Coastal Coordination Act Implementation Rules (31 TAC §505.11(b)(2)) subject to the Texas Coastal Management Program (CMP) and will, therefore, require that goals and policies of the CMP be considered during the rulemaking process.

CMP Goals: 31 TAC §501.12 states in part that "the goals of the Texas Coastal Management Program (CMP) are: (1) to protect, preserve, restore, and enhance the diversity, quality, quantity, functions, and values of coastal natural resource areas (CNRAs); (2) to ensure sound management of all coastal resources by allowing for compatible economic development and multiple human uses of the coastal zone; (3) to minimize loss of human life and property due to the impairment and loss of protective features of CNRAs;" and "(5) to balance the benefits from economic development and multiple human uses of the coastal zone, the benefits from protecting, preserving, restoring, and enhancing CNRAs, the benefits from minimizing loss of human life and property, and the benefits from public access to and enjoyment of the coastal zone."

The previously stated goals will not be adversely affected by the rule changes described in this preamble for the reason that the rulemaking provides for increased enforcement of financial assurance requirements for underground storage tank owners or operators.

CMP Policies: 31 TAC §501.13, "Administrative Policies," states in relevant part: "Agency and subdivision rules and ordinances subject to §501.10 of this title (relating to Compliance with Goals and Policies) shall: (1) require applicants to provide information necessary for an agency or subdivision to make an informed decision on a proposed action listed in §505.11 of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §505.60 of this title (relating to Local Government Actions Subject to the Coastal Management Program); (2) identify the monitoring established to ensure that activities authorized by actions listed in §505.11 of this title (relating to Actions and Rules Subject to the Coastal Management Program) or §505.60 of this title (relating to Local Government Actions Subject to the Coastal Management Program) comply with all applicable requirements; (3) identify circumstances in which agencies and subdivisions have the authority to issue variances from standards or requirements for the protection of CNRAs, including the grounds for granting variances."

The previously stated policies will not be adversely affected by the rule changes described in this preamble for the reason that there are no substantive changes relating to provision of information, monitoring of compliance, or variances.

PUBLIC COMMENT

The commission held a public hearing on the proposed rulemaking in Austin on January 17, 2008. The comment period closed on January 22, 2008. No comments were received.

STATUTORY AUTHORITY

The amendments and new section are adopted under TWC, §5.012, which provides that the commission is the agency responsible for implementing the constitution and laws of the state relating to the conservation of natural resources and protection of the environment; TWC, §5.103, which authorizes the commission to adopt any rules necessary to carry out its powers and duties under this code and other laws of this state; TWC, §5.105, which directs the commission to establish and approve all general policy of the commission by rule; TWC, §26.011, which requires the commission to control the quality of water by rule; TWC, §26.345, which authorizes the commission to develop a regulatory program and to adopt rules regarding underground storage tanks (USTs); and TWC, §26.352, which directs the commission to adopt rules establishing the requirements for maintaining evidence of financial responsibility for taking corrective action in response to a release from a UST.

The adopted amendments and new section implement changes in laws of this state made during the 80th Legislature, 2007, with the passage of HB 1956.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802057
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Effective date: May 8, 2008
Proposal publication date: December 21, 2007
For further information, please call: (512) 239-0177

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TITLE 31. NATURAL RESOURCES AND CONSERVATION

PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

CHAPTER 51. EXECUTIVE

SUBCHAPTER O. ADVISORY COMMITTEES

The Texas Parks and Wildlife Commission adopts the repeal of §51.651 and amendments to §51.607 and §51.608, concerning advisory committees, without changes to the proposed text as published in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1488).

The rules as adopted repeal the advisory committee rules regarding the Operation Game Thief Committee and restructure the agency's two game bird advisory committees.

The repeal of §51.651 and the amendments to §51.607 and §51.608 are necessary to more accurately reflect the status of the Operation Game Thief Committee and to address the restructuring of the agency's game bird advisory committees.

The Texas Parks and Wildlife Code authorizes the Chairman of the Texas Parks and Wildlife Commission (the commission) to appoint advisory committees and to "adopt rules that set the membership, terms of service, qualifications, operating procedures, and other standards to ensure the effectiveness of an advisory committee appointed under this section." Tex. Parks & Wild. Code, §11.0162. An advisory committee is a committee, council, commission, board, or task force or other entity with multiple members that has as its primary function advising a state agency in the executive branch of state government. Tex. Gov't Code, §2110.001.

For a number of years, the department has sought advice from interested persons and groups about the functions of the departments. Such input is important as the commission and the department carry out the agency's mission. The formation of advisory committees is an efficient and effective method of obtaining necessary and useful input. The department does not reimburse advisory committee members for their expenses or otherwise compensate advisory committee members.

Under Government Code, Chapter 2110, unless otherwise provided by specific statute, for each official advisory committee, a state agency must adopt rules that (1) state the purpose of the committee; (2) describe the manner in which the committee will report to the agency; and (3) establish the date on which the committee will automatically be abolished. Tex. Gov't Code, §§2110.005, 2110.008. Government Code. Chapter 2110 contains other requirements for advisory committees, such as annual evaluation, a limit of 24 members, balanced membership representation, selection of presiding officer by members, and four-year duration unless otherwise provided by rule. Tex. Gov't Code §§2110.002, 2110.003, 2110.006, 2110.008. Effective in September 2005, the Commission adopted rules regarding each of the agency's advisory committees. Those rules included the Operation Game Thief Advisory Committee, the Game Bird Advisory Board and the Texas Quail Council.

The repeal of §51.651, concerning Operation Game Thief Advisory Committee, is necessary because the department has determined that it is not necessary to maintain the committee by rule. The Operation Game Thief Committee is established by statute under Parks and Wildlife Code, §12.202, to make reward payments and death benefit payments from the Operation Game Thief fund. As a result, the Operation Game Thief Committee is not clearly an advisory committee under Government Code, Chapter 2110.In addition, there are currently other more specific rules regarding the Operation Game Thief program under 31 TAC §§55.111 - 55.116.

The amendments to §51.607, concerning the Game Bird Advisory Board, and §51.608, concerning the Texas Quail Council, reconfigure those two sections. The amendment to §51.607 changes the name of the Game Bird Advisory Board to the Migratory Game Bird Advisory Board. The amendment also limits the scope of the committee's role to those issues affecting migratory game birds.

The amendment to §51.608 changes the name of the Texas Quail Council to the Upland Game Bird Advisory Board. The amendment also expands the scope of the committee's role to include issues affecting all upland game birds. Although the scope of this committee's role has been expanded, issues involving quail will continue to be an important component of this committee's role.

The changes to the two game bird advisory committees will also more closely align the advisory committee structure with current law regarding hunting stamps. In 2005 the 79th Texas Legislature repealed the turkey stamp, the white-winged dove stamp, and the duck stamp and replaced them with the upland game bird stamp and the migratory game bird stamp. By statute, revenues from the sale of the respective stamps are specifically dedicated to habitat acquisition, research, and management of upland game birds and migratory game birds, respectively. Since the department's research and management activities now reflect this dichotomy, the department has determined that is appropriate and necessary for the charges to the department's advisory boards to be similarly delineated. Therefore, the amendments replace the Game Bird Advisory Board with the Migratory Game Bird Advisory Board and the Texas Quail Council with the Upland Game Bird Advisory Board.

The repeal of §51.651 will function by eliminating regulations that are not necessary. The amendments to §51.607 and §51.608 will function by making the regulations governing the department's game bird advisory boards reflect the department's operational and organizational approaches to game bird management.

The department received three comments opposing adoption of the proposed rules. Of those comments, one expressed a specific rationale or reasoning for opposing adoption. That comment, accompanied by the department's response to each, is as follows.

One commenter opposed adoption and stated that committee members should not be reimbursed. The department agrees with the comment and responds that advisory board members do not receive reimbursement of any kind. No changes were made as a result of the comment.

The department received 14 comments supporting adoption of the rules as proposed.

No groups or associations commented on the proposed rules.

DIVISION 2. WILDLIFE

31 TAC §51.607, §51.608

The amendments are adopted under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §§2110.005, 2110.008.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 15, 2008.

TRD-200801977
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: May 5, 2008
Proposal publication date: February 22, 2008
For further information, please call: (512) 389-4775

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DIVISION 6. LAW ENFORCEMENT

31 TAC §51.651

The repeal is adopted under the authority of Parks and Wildlife Code, §11.0162 and Government Code, §§2110.005, 2110.008.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 15, 2008.

TRD-200801978
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: May 5, 2008
Proposal publication date: February 22, 2008
For further information, please call: (512) 389-4775

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CHAPTER 53. FINANCE

SUBCHAPTER A. FEES

DIVISION 1. LICENSE, PERMIT, AND BOAT AND MOTOR FEES

31 TAC §53.10

The Texas Parks and Wildlife Commission adopts an amendment to §53.10, concerning Public Hunting and Fishing Permits and Fees, without changes to the proposed text as published in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1490).

The amendment allows the purchase of Big Time Texas Hunt (BTTH) entries via the department's web site for $9 per entry. Parks and Wildlife Code, §11.0271, authorizes the department to conduct public drawings for public hunting privileges and to charge a participation fee for the drawings. The BTTH program offers selected special hunting opportunities to the public by random drawing from a pool of applicants who have purchased an entry or entries. There is no limit on the number of entries a person may purchase. The proceeds from the sale of the entries are used to provide the hunting opportunities and to supplement the department's public hunting programs.

The department believes that the offer of a reduced price for entries purchased via the Internet will encourage customers to make such purchases via the Internet and result in increased participation in BTTH drawings. Increased sales of BTTH entries will increase revenues to support the department's public hunting program.

In addition, a reduced price for Internet entries will also support the department's effort to more fully use the Internet to provide information to potential BTTH participants about the benefits of the BTTH program. Historically, TPWD has been very successful in obtaining BTTH participation by providing BTTH information by direct mail to certain hunting and fishing license holders and previous BTTH purchasers. However, the costs associated with such direct mail efforts continue to rise. The department believes that it can reduce these costs by expanding its email communications to those online customers who prefer to be reached via this method. Such methods of communication will also enhance the convenience with which a person may purchase one or more BTTH entries. The department believes that the reduced price for Internet purchases of BTTH entries will assist the department in expanding efforts to encourage participation in BTTH and increase BTTH purchases without an increase in cost to the department.

The amendment as adopted will function by establishing a fee of $9 per entry for BTTH entries purchased via the department's website.

The department received 11 comments opposing adoption of the proposed rules. Of those comments, four expressed a specific rationale or reasoning for opposing adoption. Those comments, accompanied by the department's response to each, are as follows.

One commenter opposed adoption and stated that the fee for BTTH entries should be the same, irrespective of method of purchase. The department disagrees with the comment and responds that a reasonable fee reduction should be offered to those who purchase BTTH entries in a manner that is more cost-efficient to the department than the current method. No changes were made as a result of the comment.

One commenter opposed adoption and stated that should not be any price increase. The department agrees with the commenter. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the rule discriminated against rural and older hunters who do not have reliable access to the Internet. The department disagrees with the comment and responds that according to the Pew Internet and American Life Project, over 73% of Americans had access to the Internet in 2006. The U.S. Census Bureau in 2003 estimated that approximately 30% of Internet users are aged 65 and older. The department believes that Internet usage by all demographic groups will increase and that the rule as adopted is not discriminatory. No changes were made as a result of the comment.

One commenter opposed adoption and stated that the department should offer reduced fees for the online purchase of entries for public hunting opportunities. The department responds that the rule proposal was limited to the BTTH program and did not affect the public hunting programs operated by the department. No changes were made as a result of the comment.

The department received 20 comments supporting adoption of the proposed rule.

No groups or associations commented on the proposed rule.

The amendment is adopted under the authority of Parks and Wildlife Code, §11.0271, which requires the commission to set any fees for participation in a drawing to select applicants for public hunting privileges.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 15, 2008.

TRD-200801979
Ann Bright
General Counsel
Texas Parks and Wildlife Department
Effective date: May 5, 2008
Proposal publication date: February 22, 2008
For further information, please call: (512) 389-4775

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TITLE 34. PUBLIC FINANCE

PART 1. COMPTROLLER OF PUBLIC ACCOUNTS

CHAPTER 5. FUNDS MANAGEMENT (FISCAL AFFAIRS)

SUBCHAPTER N. FUNDS ACCOUNTING--ACCOUNTING POLICY STATEMENTS

34 TAC §5.160

The Comptroller of Public Accounts (comptroller) adopts an amendment to §5.160, concerning Incorporation by Reference: Accounting Policy Statements 2008 - 2009, without changes to the proposed text as published in the March 14, 2008, issue of the *Texas Register* (33 TexReg 2264).

The accounting policy statements are issued to provide procedures and guidelines to state agencies for the effective operation of the Uniform Statewide Accounting System (USAS) and for preparation of the annual financial report. Each accounting policy statement contains legal references, a background section, comptroller requirements and state agency requirements, and division contact if more information is needed. Section 5.160 is also being amended to correct the applicable biennium years and the effective date of the accounting policy statements.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Government Code, §§403.011, 2101.012, 2101.035, and 2101.037 which provide the comptroller with the authority to prescribe rules and procedures relating to the operation of the Uniform Statewide Accounting System, the preparation of the annual financial report and supervising the state's fiscal concerns.

The amendment implements Government Code, §§403.011, 2101.012, 2101.035, and 2101.037.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 18, 2008.

TRD-200802025
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: May 8, 2008
Proposal publication date: March 14, 2008
For further information, please call: (512) 475-0387

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CHAPTER 7. PREPAID HIGHER EDUCATION TUITION PROGRAM

SUBCHAPTER D. EXECUTIVE DIRECTOR

34 TAC §7.33

The Comptroller of Public Accounts adopts an amendment to §7.33, concerning delegated responsibilities, without changes to the proposed text as published in the January 18, 2008, issue of the *Texas Register* (33 TexReg 497). The rule is amending paragraph (5) to reference Government Code, §2254.021(2), as it pertains to the value of a contract.

No comments were received regarding adoption of the amendment.

The amendment is adopted under Education Code, §54.618(b)(2), which gives the board the authority to adopt rules to implement this subchapter.

The amendment implements Education Code, §54.618(b)(7), which gives the board the authority to contract for necessary goods and services and engage the services of private consultants, actuaries, trustees, records administrators, legal counsel, and auditors for administrative or technical assistance.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on April 16, 2008.

TRD-200801985
Martin Cherry
General Counsel
Comptroller of Public Accounts
Effective date: May 6, 2008
Proposal publication date: January 18, 2008
For further information, please call: (512) 475-0387

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REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review;* (2) notices of *intention to review,* which invite public comment to specified rules; and (3) notices of *readoption,* which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (http://www.sos.state.tx.us/texreg). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative* Code on the web site (http://www.sos.state.tx.us/tac).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

Agency Rule Review Plan

General Land Office

Title 31, Part 1

(Editor's Note: The General Land Office incorrectly submitted its Agency Rule Review Plan as a Proposed Rule Review. The submission was published in the May 25, 2007, issue of the Texas Register (32 TexReg 2883). The General Land Office has resubmitted the Agency Rule Review Plan and it will be available in its entirety at http://www.sos.state.tx.us/texreg/review/2008/index.shtml.)

TRD-200802022
Filed: April 18, 2008

♦ ♦ ♦

Proposed Rule Reviews

General Land Office

Title 31, Part 1

In accordance with §2001.039 Government Code, the Texas General Land Office (GLO) submits the following Notice of Intent to Review the rules found in 31 TAC, Part 1, Chapter 1 relating to Executive Administration, including Subchapter B, relating to Purchase of Excess Acreage, §§1.11 - 1.14; Subchapter C, relating to Procedure for Patenting Land, §§1.21 - 1.30; Subchapter D, relating to Patents to Land Under Law, §1.41 and §1.42; and Subchapter G, relating to Procedure for Submitting and Processing Applications for Approval of Patent Land Released by the State, §§1.90 - 1.97. This review of Chapter 1 is filed in accordance with the General Land Office's Rule Review Plan published in this issue of the *Texas Register*.

Review of the rules under this chapter will determine whether the reasons for adoption of the rules continue to exist. This Notice of Intent to Review of 31 TAC, Part 1, Chapter 1, Executive Administration, applies to the chapter in its entirety.

The GLO invites suggestions from the public during the review process and will address any comments received. Any questions or comments should be directed to Walter Talley, *Texas Register* Liaison, General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this notice.

TRD-200802004
Trace Finley
Policy Director
General Land Office
Filed: April 16, 2008

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In accordance with §2001.039, Government Code, the Texas General Land Office (GLO) submits the following Notice of Intent to Review the rules found in 31 TAC, Part 1, Chapter 2, relating to Rules of Practice and Procedure, including Subchapter A, relating to Procedures for Contested Case Hearings, §§2.1 - 2.28; Subchapter B, relating to Procedures for Non-Contested Case Hearings, §§2.31 - 2.36; and Subchapter C, relating to Procedures for Special Board of Review Hearings, §§2.40 - 2.50. This review of Chapter 2 is filed in accordance with the General Land Office's Rule Review Plan as published elsewhere in this issue of the *Texas Register*.

Review of the rules under this chapter will determine whether the reasons for adoption of the rules continue to exist. This Notice of Intent to Review of 31 TAC, Part 1, Chapter 2, Rules of Practice and Procedure, applies to the chapter in its entirety.

The GLO invites suggestions from the public during the review process and will address any comments received. Any questions or comments should be directed to Walter Talley, *Texas Register* Liaison, General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this notice.

TRD-200802005
Trace Finley
Policy Director
General Land Office
Filed: April 16, 2008

♦ ♦ ♦

In accordance with §2001.039 Government Code, the Texas General Land Office (GLO) submits the following Notice of Intent to Review the rules found in 31 TAC, Part 1, Chapter 9 relating to Exploration and Leasing of State Oil and Gas, including Subchapter A, relating to General Provisions, §9.1 and §9.2; Subchapter B, relating to Issuing Exploration Permits and Oil and Gas Leases, §§9.11, 9.21, and 9.22; Subchapter C, relating to Maintaining a State Oil and Gas Lease, §§9.31 - 9.38; Subchapter D, relating to Paying Royalty to the State, §19.51; Subchapter E, relating to Pooling and Unitizing State Property, §19.81, and Subchapter F, relating to Discontinuing the Leasehold Relationship, §§9.91 - 9.95. This review of Chapter 9 is filed in accordance

with the General Land Office's Rule Review Plan as published elsewhere in this issue of the *Texas Register*.

Review of the rules under this chapter will determine whether the reasons for adoption of the rules continue to exist. This Notice of Intent to Review of 31 TAC, Part 1, Chapter 9, Exploration and Leasing of State Oil and Gas, applies to the chapter in its entirety.

The GLO invites suggestions from the public during the review process and will address any comments received. Any questions or comments should be directed to Walter Talley, *Texas Register* Liaison, General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this notice.

TRD-200802006
Trace Finley
Policy Director
General Land Office
Filed: April 16, 2008

♦ ♦ ♦

In accordance with §2001.039, Government Code, the Texas General Land Office (GLO) submits the following Notice of Intent to Review the rules found in 31 TAC, Part 1, Chapter 10 relating to Exploration and Development of State Minerals Other Than Oil and Gas, §§10.1 - 10.10. This review of Chapter 10 is filed in accordance with the General Land Office's Rule Review Plan as published elsewhere in this issue of the *Texas Register*.

Review of the rules under this chapter will determine whether the reasons for adoption of the rules continue to exist. This Notice of Intent to Review of 31 TAC, Part 1, Chapter 10, Exploration and Development of State Minerals Other Than Oil and Gas, applies to the chapter in its entirety.

The GLO invites suggestions from the public during the review process and will address any comments received. Any questions or comments should be directed to Walter Talley, *Texas Register* Liaison, General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this notice.

TRD-200802007
Trace Finley
Policy Director
General Land Office
Filed: April 16, 2008

♦ ♦ ♦

In accordance with §2001.039 Government Code, the Texas General Land Office (GLO) submits the following Notice of Intent to Review the rules found in 31 TAC, Part 1, Chapter 14, relating to Relationship Between Agency and Private Organizations, §§14.1 - 14.5. This review of Chapter 14 is filed in accordance with the General Land Office's Rule Review Plan as published elsewhere in this issue of the *Texas Register*.

Review of the rules under this chapter will determine whether the reasons for adoption of the rules continue to exist. This Notice of Intent to Review of 31 TAC, Part 1, Chapter 14, Relationship Between Agency and Private Organizations, applies to the chapter in its entirety.

The GLO invites suggestions from the public during the review process and will address any comments received. Any questions or comments should be directed to Walter Talley, *Texas Register* Liaison, General Land Office, P.O. Box 12873, Austin, Texas 78711-2873, facsimile number (512) 463-6311 or email to walter.talley@glo.state.tx.us. Written comments must be received no later than thirty (30) days from the date of publication of this notice.

TRD-200802008
Trace Finley
Policy Director
General Land Office
Filed: April 16, 2008

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Texas Department of Insurance, Division of Workers' Compensation

Title 28, Part 2

The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 116 concerning General Provisions -- Subsequent Injury Fund. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules:

§116.11. Request for Reimbursement or Refund from the Subsequent Injury Fund.

§116.12. Subsequent Injury Fund Payment/Reimbursement Schedule.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on June 2, 2008 and submitted to Victoria Ortega, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-200802144
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: April 23, 2008

♦ ♦ ♦

The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 147 concerning Dispute Resolution -- Agreements, Settlements, Commutations. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules:

§147.1. Definitions.

§147.2. Form.

§147.3. Execution.

§147.4. Filing Agreements with the Commission; Effective Dates.

§147.5. Filing Settlements with the Commission; Effective Dates.

§147.6. Settlement Conference.

§147.7. Effect on Previously Entered Decisions and Orders.

§147.8. Withdrawal from Settlement.

§147.9. Requirements for Agreements and Settlements.

§147.10. Commutation of Impairment Income Benefits.

§147.11. Notification of Commission of Proposed Judgments and Settlements.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on June 2, 2008 and submitted to Victoria Ortega, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-200802145
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: April 23, 2008

♦ ♦ ♦

The Texas Department of Insurance, Division of Workers' Compensation files this notice of intention to review the rules contained in Chapter 152 concerning Attorneys' Fees. This review is pursuant to the General Appropriations Act, Article IX, §167, 75th Legislature, the General Appropriations Act, Section 9-10, 76th Legislature, and Texas Government Code §2001.039 as added by SB-178, 76th Legislature.

The Division's reason for adopting the following rules contained in this chapter continues to exist and it proposes to readopt these rules:

§152.1. Attorney Fees: General Provisions.

§152.2. Attorney Fees: Representation of Claimants.

§152.3. Approval or Denial of Fee by the Commission.

§152.4. Guidelines for Legal Services Provided to Claimants and Carriers.

§152.5. Allowable Expenses.

Comments regarding whether the reason for adopting these rules continues to exist must be received by 5:00 p.m. on June 2, 2008 and submitted to Victoria Ortega, Texas Department of Insurance, Division of Workers' Compensation, 7551 Metro Center Drive, Suite 100, MS-4D, Austin, Texas 78744-1609.

TRD-200802146
Norma Garcia
General Counsel
Texas Department of Insurance, Division of Workers' Compensation
Filed: April 23, 2008

♦ ♦ ♦

Texas State Board of Plumbing Examiners

Title 22, Part 17

The Texas State Board of Plumbing Examiners (Board) will review and consider for re-adoption, re-adopt with amendments, or repeal Title 22, Part 17, Chapter 365 Licensing and Registration. This review is done pursuant to Texas Government Code, §2001.039, which requires agencies to periodically review rules. A preliminary review of this chapter indicates that the reasons for initially adopting these rules continue to exist. The Board will determine whether the reasons for re-adopting these rules continue to exist.

All comments or questions in response to this notice of intention to review may be submitted within 30 days of this proposal being published in the *Texas Register* to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

Any proposed changes to this chapter as a result of this review will be published in the Proposed Rules section of the *Texas Register* and will be open for public comments for a 30-day period prior to final adoption of any repeal, amendment or new section.

TRD-200802011
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Filed: April 17, 2008

♦ ♦ ♦

The Texas State Board of Plumbing Examiners (Board) will review and consider for re-adoption, re-adopt with amendments, or repeal Title 22, Part 17, Chapter 367 Enforcement. This review is done pursuant to Texas Government Code, §2001.039, which requires agencies to periodically review rules. A preliminary review of this chapter indicates that the reasons for initially adopting these rules continue to exist. The Board will determine whether the reasons for re-adopting these rules continue to exist.

All comments or questions in response to this notice of intention to review may be submitted within 30 days of this proposal being published in the *Texas Register* to Robert L. Maxwell, Executive Director, Texas State Board of Plumbing Examiners, 929 East 41st Street, P.O. Box 4200, Austin, Texas 78765-4200.

Any proposed changes to this chapter as a result of this review will be published in the Proposed Rules section of the *Texas Register* and will be open for public comments for a 30-day period prior to final adoption of any repeal, amendment or new section.

TRD-200802012
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Filed: April 17, 2008

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Adopted Rule Reviews

Office of Consumer Credit Commissioner

Title 7, Part 5

The Finance Commission of Texas, on behalf of the Office of Consumer Credit Commissioner, has completed the review of Texas Administrative Code, Title 7, Part 5, Chapter 82, relating to Administration, pursuant to Texas Government Code, §2001.039. Chapter 82 contains §82.1, concerning Custody of Criminal History Record Information, and §82.2, concerning Public Information Requests; Charges.

Notice of the review of 7 TAC Chapter 82 was published in the *Texas Register* as required on March 7, 2008 (33 TexReg 2043). The agency received no comments in response to that notice.

The commission finds that the reasons for initially adopting these rules continue to exist, and readopts these sections without changes in accordance with the requirements of Texas Government Code, §2001.039.

This concludes the review of 7 TAC Chapter 82.

TRD-200802050

Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: April 18, 2008

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Texas Facilities Commission

Title 1, Part 5

Pursuant to the notice of the proposed rule review published in the December 21, 2007, issue of the *Texas Register* (32 TexReg 9735), the Texas Facilities Commission (Commission) has reviewed and considered for readoption, revision, or repeal Texas Administrative Code, Title 1, Part 5, Chapter 115, Facilities Leasing Program, in accordance with the Texas Government Code §2001.039 (Vernon 2000). The Commission has considered, among other things, whether the agency rulemaking authority and business necessity associated with the adoption of these rules continue to exist.

No comments were received on the proposed rule review.

During its review, the Commission determined that the agency rulemaking authority remains in effect and the business necessity for these rules also continues to exist. The Commission intends to readopt Texas Administrative Code, Title 1, Part 5, §§115.1 - 115.4, 115.6, 115.8, and 115.10 as these rules were promulgated to direct procurement by the Commission of leases for certain types of real property under Texas Government Code, Chapter 2167 for the use and benefit of state agencies, including prerequisites to leasing space such as state agency requests for lease space and certification of availability of funds for lease space. This chapter also provides for delegations of leasing authority and addresses leasing services offered to state agencies otherwise excluded from leasing requirements, use of private firms to obtain lease space, and tenant agency responsibilities and reporting.

Revisions to these rules, however, are required to reflect the agency's name change, to delete definitions no longer in use, and to correct typographical errors, including reformatting. Also, pursuant to statutory rulemaking requirements, a new §115.13, entitled Best Value Guidelines, is added to outline in greater detail the factors considered when the Commission evaluates responses to solicitations associated with the procurement of lease space for the use and benefit of state agencies under Texas Government Code, Chapter 2167 and makes a best value determination on which a solicitation award is based. Through a concurrent notice of proposed rules, the Commission readopts 1 Texas Administrative Code §§115.1 - 115.4, 115.6, 115.8, and 115.10 with amendments and proposes a new §115.13 in this issue of the *Texas Register*

These rules are readopted under the statutory authority granted to the Commission in Texas Government Code, §2167.0021(b) (Vernon Supp. 2007) and §2167.008 (Vernon 2000).

This completes the Commission's review of Texas Administrative Code, Title 1, Part 5, Chapter 115, Facilities Leasing Program.

TRD-200802018
Kay Molina
General Counsel
Texas Facilities Commission
Filed: April 18, 2008

♦ ♦ ♦

Texas State Library and Archives Commission

Title 13, Part 1

The Texas State Library and Archives Commission has completed the rule review of Title 13, Part 1, Chapter 1, relating to Library Development, in accordance with the requirements of Government Code, §2001.039. The commission proposed the review of Chapter 1 in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1607).

The commission received no comments on the review of Chapter 1.

The Commission assessed whether the reasons for adopting or readopting the rules in Chapter 1 continue to exist. The commission found a continuing need for the rules.

The rules in Chapter 1 are adopted under Government Code §441.006 that provides the commission with authority to govern the Texas State Library, §441.009 that provides the commission with authority to adopt a state plan for library services, §441.0091 which provides the commission with authority to adopt rules on various subjects, §441.136 that provides the commission with authority to adopt rules for administration of the Library Systems Act, and §441.138 that provide the commission to use funds appropriated by the legislature for administrative expenses.

The adopted sections affect Government Code §§441.121 - 441.139.

TRD-200802027
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Filed: April 18, 2008

♦ ♦ ♦

The Texas State Library and Archives Commission has completed the rule review of Title 13, Part 1, Chapter 4, relating to School Library Programs, in accordance with the requirements of Government Code, §2001.039. The commission proposed the review of Chapter 4 in the February 22, 2008, issue of the *Texas Register* (33 TexReg 1608).

The commission received no comments on the review of Chapter 4.

The Commission assessed whether the reasons for adopting or readopting the rules in Chapter 4 continue to exist. The commission has determined that the reasons for adopting these rules continue to exist.

The rules in Chapter 4 are adopted under Education Code §33.021 which requires the Texas State Library and Archives Commission to adopt standards for school library services in consultation with the State Board of Education, and Government Code §441.006(a)(1-2) which authorizes the Commission to govern the Texas State Library and adopt rules to aid and encourage libraries.

The adopted sections affect Education Code §33.02.

TRD-200802028
Edward Seidenberg
Assistant State Librarian
Texas State Library and Archives Commission
Filed: April 18, 2008

♦ ♦ ♦

Texas Board of Physical Therapy Examiners

Title 22, Part 16

The Texas Board of Physical Therapy Examiners adopts the rules in the following chapters, pursuant to the Texas Government Code, §2001.039. The proposed review was published in the February 29, 2008, issue of the *Texas Register* (33 TexReg 1819).

Chapter 321. Definitions.

Chapter 322. Practice.

Chapter 323. Powers and Duties of the Board.

Chapter 325. Organization of the Board.

Chapter 327. Compensation.

Chapter 329. Licensing Procedure.

Chapter 335. Professional Title.

Chapter 337. Display of License.

Chapter 339. Fees.

Chapter 341. License Renewal.

Chapter 342. Open Records.

Chapter 343. Contested Case Procedure.

Chapter 344. Administrative Fines and Penalties.

Chapter 345. Accessible Services.

Chapter 346. Practice Settings for Physical Therapy.

Chapter 347. Registration of Physical Therapy Facilities.

The Texas Board of Physical Therapy Examiners is concurrently adopting amendments to §329.5, Licensing Procedures for Foreign-Trained Applicants, as published in the same issue of the *Texas Register.*

No comments were received regarding adoption of the review.

The agency's reason for adopting the rules contained in these chapters continues to exist.

This concludes the review of all rules by the Texas Board of Physical Therapy Examiners.

TRD-200801984
John P. Maline
Executive Director
Texas Board of Physical Therapy Examiners
Filed: April 16, 2008

♦ ♦ ♦

Texas State Board of Plumbing Examiners

Title 22, Part 17

The Texas State Board of Plumbing Examiners (Board) re-adopts Title 22, Part 17, Chapter 361 Administration, without changes as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 953). No comments were received regarding the rule review.

The Board has determined that the reasons for initially adopting these rules continue to exist. This concludes the review of Title 22, Part 17, Chapter 361 Administration.

The review and re-adoption of Chapter 361 is done pursuant to Texas Government Code, §2001.039, which requires agencies to periodically review rules. The re-adoption is also authorized under and affect Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), §1301.251, which requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

TRD-200802013
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Filed: April 17, 2008

♦ ♦ ♦

The Texas State Board of Plumbing Examiners (Board) re-adopts Title 22, Part 17, Chapter 363 Examinations, without changes as published in the February 1, 2008, issue of the *Texas Register* (33 TexReg 953). No comments were received regarding the rule review.

The Board has determined that the reasons for initially adopting these rules continue to exist. This concludes the review of Title 22, Part 17, Chapter 363 Examinations.

The review and re-adoption of Chapter 363 is done pursuant to Texas Government Code, §2001.039, which requires agencies to periodically review rules. The re-adoption is also authorized under and affect Title 8, Chapter 1301, Occupations Code ("Plumbing License Law"), §1301.251, which requires the Board to adopt and enforce rules necessary to administer the Plumbing License Law.

TRD-200802014
Robert L. Maxwell
Executive Director
Texas State Board of Plumbing Examiners
Filed: April 17, 2008

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TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 7 TAC §84.808(1)(A)

"(Optional:)DATE _____)

BUYER _____
ADDRESS _____
CITY _____STATE_____ ZIP _____
PHONE _____

SELLER/CREDITOR_____
ADDRESS _____
CITY _____ TX __ ZIP _____
PHONE _____

(Optional Co-Buyer Identification)
CO-BUYER _____
ADDRESS _____
CITY _____ STATE_____ZIP_____
PHONE _____"

Figure: 7 TAC §84.808(5)

MOTOR VEHICLE IDENTIFICATION

Stock No.	Year	Make	Model	Vehicle Identification Number	License Number (if applicable)	☐ New ☐ Demonstrator ☐ Factory Official/Executive ☐ Used	USE FOR WHICH PURCHASED ☐ PERSONAL, FAMILY OR HOUSEHOLD ☐ BUSINESS OR COMMERCIAL ☐ AGRICULTURAL

Figure: 7 TAC §84.808(6)

"Trade-in: Year_____ Make_____ Model_____ VIN_____ License No._____"

Figure: 7 TAC §84.808(7)

ANNUAL PERCENTAGE RATE The cost of my credit as a yearly rate.	**FINANCE CHARGE** The dollar amount the credit will cost me.	**Amount Financed** The amount of credit provided to me or on my behalf.	**Total of Payments** The amount I will have paid after I have made all payments as scheduled.	**Total Sale Price** The total cost of my purchase on credit, including down payment of $_____
%	$	$	$	$

My Payment Schedule will be:

Number of Payments	**Amount of Payments**	**When Payments Are Due**

Security: You will have a security interest in the motor vehicle being purchased.
Late Charge: **[True daily earnings:]** (Option A:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the past due amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment. **[Scheduled Installment Earnings Method or sum of the periodic balances:]** (Option A:) If I do not pay my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge on the past due amount at the contract rate. (Option B:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge at the rate of _____% per year on the late amount. The late charge on the past due amount will be earned from the due date to the date that it is paid. (Option C:) If you do not receive my entire payment within 15 days after it is due (10 days if I am buying a heavy commercial vehicle), I will pay a late charge of _____% of the scheduled payment.
Prepayment: **[True daily earnings method:]** If I pay all that I owe early, I will not have to pay a penalty. **[Sum of the periodic balances method:]** I can pay all that I owe early. If I do so, I can get a refund of part of the Finance Charge.
Additional Information: I will refer to this document for information about nonpayment, default, security interests, any required repayment in full before the scheduled date, and prepayment refunds.

Figure: 7 TAC §84.808(8)(A)

ITEMIZATION OF AMOUNT FINANCED

1.	Cash price [Optional additional description: "(including any accessories, services, and taxes)"]		$_____(1)
2.	Downpayment =		
	[*If netting add*: (if negative, enter "0" and see Line 4.A. below)]		
	Gross trade-in	$_____	
	- payoff by seller	$_____	
	= net trade-in	$_____	
	[*If not netting add*: (if negative enter "0" and see Line 4.A. below)]		
	+ cash	$_____	
	+ Mfrs. Rebate	$_____	
	+ other (describe) _____	$_____	
	Total downpayment		$_____(2)
3.	Unpaid balance of cash price (1 minus 2)		$_____(3)
4.	Other charges including amounts paid to others on my behalf (Seller may keep part of these amounts.):		
	A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____	$_____	
	B. Cost of physical damage insurance paid to insurance company	$_____	
	C. Cost of optional coverages with physical damage insurance paid to insurance company	$_____	
	D. Cost of optional credit insurance paid to insurance company or companies	$_____	
	Life		
	Disability		
	E. Other insurance paid to the insurance company	$_____	
	F. Official fees paid to government agencies	$_____	
	G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)]	$_____	
	H. Sales tax [*Optional addition*: (if not included in cash price)]	$_____	
	I. Other taxes [*Optional addition*: (if not included in cash price)]	$_____	
	J. Government license and/or registration fees	$_____	
	K. Government certificate of title fee	$_____	
	L. Government vehicle inspection fees	$_____	
	M. Deputy service fee paid to dealer	$_____	
	N. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law. [*Option to insert Spanish translation of disclosure here.*]**	$_____	
	O. Other charges (Seller must identify who is paid and describe purpose)		
	to_____for_____	$_____	
	to_____for_____	$_____	
	to_____for_____		
		$_____	
	Total other charges and amounts paid to others on my behalf		$_____(4)
5.	**Amount Financed** (3 + 4)		$_____(5)

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $7.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller and the seller may also retain parts of the insurance, service contracts, and other charges.]

[*Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.*]

Figure: 7 TAC §84.808(8)(B)

ITEMIZATION OF AMOUNT FINANCED

1. Cash price [Optional additional description: "(including any accessories, services, and taxes)"] $_____(1)

2. Downpayment (A + B) =
   A. [*If netting add*: (if negative, enter "0" and see Line 4.A. below)]
   Gross trade-in $_____
   - payoff by seller $_____
   = net trade-in $_____
   B. [*If not netting add*: (if negative enter "0" and see Line 4.A. below)]
   + cash $_____
   + Mfrs. Rebate $_____
   + other (describe) _____ $_____
   Total downpayment $_____(2)

3. Unpaid balance of cash price (1 minus 2) $_____(3)

4. Other charges including amounts paid to others on my behalf (Seller may keep part of these amounts.):
   A. Net trade-in payoff [*Alternative caption*: "prior credit or lease balance"] to _____ $_____
   B. Cost of physical damage insurance paid to insurance company $_____
   C. Cost of optional coverages with physical damage insurance paid to insurance company $_____
   D. Cost of optional credit insurance paid to insurance company or companies $_____
      Life
      Disability
   E. Other insurance paid to the insurance company $_____
   F. Official fees paid to government agencies $_____
   G. Dealer's inventory tax [*Optional addition*: (if not included in cash price)] $_____
   H. Other taxes [*Optional addition*: (if not included in cash price)] $_____
   I. Government license and/or registration fees $_____
   J. Government certificate of title fee $_____
   K. Government vehicle inspection fees $_____
   L. Deputy service fee paid to dealer $_____
   M. **Documentary fee. A documentary fee is not an official fee. A documentary fee is not required by law, but may be charged to buyers for handling documents and performing services relating to the closing of a sale. A documentary fee may not exceed $50. This notice is required by law. [*Option to insert Spanish translation of disclosure here.*]** $_____
   N. Other charges (Seller must identify who is paid and describe purpose)
      to_____for_____ $_____
      to_____for_____ $_____
      to_____for_____ $_____
   Total Itemized Charges upon which the Finance Charge is assessed $_____(4)

5. Total Unpaid Balance Plus Itemized Charges Upon which the Finance Charge is assessed. (3+4) $_____(5)

6. Total Sales Tax (Upon Which No Finance Charge is Assessed) $_____(6)

7. **Amount Financed** (5+6) $_____(7)

   Finance Charge (Not Assessed Upon Sales Tax) $_____

[*Optional Caption*: Taxes, title fee, license fee, and any state inspection fee (*except for $7.00 of each such inspection fee that will be retained by Seller*) will be paid by Seller to government agencies. Documentary fee and deputy service fee will be retained by Seller.]

[*Note: A creditor may delete portions of the figure applicable to any insurance premiums that are not financed in the contract and may also delete other inapplicable portions.*]

Figure: 7 TAC §84.808(10)

DEFERRED DOWNPAYMENT(S)	
AMOUNT	**DATE DUE**

Figure: 7 TAC §84.808(11)

MODEL CLAUSE FOR PHYSICAL DAMAGE INSURANCE

PROPERTY INSURANCE: I must keep the collateral insured against damage or loss in the amount I owe. I must keep this insurance until I have paid all that I owe under this contract. I may obtain property insurance from anyone I want or provide proof of insurance I already have. The insurer must be authorized to do business in Texas. I agree to give you proof of property insurance. I must name you as the person to be paid under the policy in the event of damage or loss.

[Note: The following optional provisions are included for Creditors who finance physical damage insurance. Creditors who do not routinely finance Physical Damage coverage, or who are not financing it in a particular transaction, may delete the remaining disclosures in this Figure. A creditor may also delete those portions below that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.]

If any insurance is included below, policies or certificates from the insurance company will describe the terms, conditions and deductibles.

A. Physical damage insurance. If you obtain physical damage insurance, the coverages, terms and premiums for these terms are set forth below.

Coverage	Term in Months	Premium
Collision	___	☐$_____
Comprehensive	___	☐$_____
Fire, Theft, and Combined Additional Coverage	___	☐$_____
Other	___	☐$_____

B. Optional coverages with physical damage insurance. If I have chosen this insurance, the premiums for the initial _____ month term are itemized below. ***[Note: alternatively, these optional coverages may be disclosed as part of Figure: 7 TAC §84.209(12).]***

☐$_____ Towing and Labor Costs Reimbursement ☐$_____ Rental Reimbursement

☐$_____ Other:_____

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner. If the premium is for a required coverage, I have the option, for a period of 10 days from the date I receive a copy of this contract, of furnishing that coverage through existing policies of insurance or by obtaining like coverage from any insurance company authorized to do business in Texas.

I agree to purchase the above checked coverages.

Buyer's Signature: _____ Date: _____

Figure: 7 TAC §84.808(12)

MODEL CLAUSE FOR OPTIONAL INSURANCE COVERAGES

Optional insurance coverages. The insurance described below is not required to obtain credit. It will not be provided unless I sign and agree to pay the extra cost. [***At Creditor's Option, the following may be added:***] My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

Coverage	Term in Months	Premium
GAP*	_____	☐ $_____
Invol. Unemployment	_____	☐ $_____
_____	_____	☐ $_____
Liability Insurance	_____	☐ $_____

$_____ per person $_____ property damage
$_____ per accident

*If the motor vehicle is determined to be a total loss, GAP Insurance will pay you the difference between the proceeds of my basic collision policy and the amount I owe on the motor vehicle, minus my deductible. I can cancel that insurance without charge for 10 days from the date of this contract.

If the box next to a premium for an insurance coverage included above is marked, that premium is not fixed or approved by the Texas Insurance Commissioner.

I want the optional coverages for which premiums are included above.

Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance optional coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the Figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

Figure: 7 TAC §84.808(13)

MODEL CLAUSE FOR OPTIONAL CREDIT LIFE AND ACCIDENT AND HEALTH (DISABILITY) INSURANCE

Optional credit life and credit disability insurance. Credit life insurance and credit disability insurance are not required to obtain credit. They will not be provided unless I sign and agree to pay the extra cost. [***At Creditor's Option, the following may be added:***] My decision to buy or not buy these insurance coverages will not be a factor in the credit approval process.

☐Credit Life, one buyer	$_____	☐Credit Life, both buyers	$_____	Term _____
☐Credit Disability, one buyer	$_____	☐Credit Disability, both buyers	$_____	Term _____

[***Optional additional sentence for balloon payment contracts:***] Credit Life Insurance is for the scheduled term of this contract. Credit Disability Insurance covers the first ____ payments and does not cover the last scheduled payment. [***Optional additional language for true daily earnings method contracts:***] Credit life insurance pays only the amount I would owe if I paid all my payments on time. Credit disability insurance does not cover any increase in my payment or in the number of payments.

If the term of the insurance is 121 months or longer, the premium is not fixed or approved by the Texas Insurance Commissioner.

I want the insurance indicated above.
Buyer's Signature: _____ Date: _____
Co-Buyer's Signature: _____ Date: _____

[***Note: A creditor who does not routinely finance these coverages, or does not finance them in a particular transaction, may omit this figure. A creditor may also delete those portions of the Figure that pertain to coverages it does not routinely finance, or that pertain to coverages that it is not financing in a particular transaction.***]

Figure: 7 TAC §84.808(15)

"Any change to this contract must be in writing. Both you and I must sign it. No oral changes to this contract are enforceable.

_____Buyer _____Co-Buyer"

Figure: 7 TAC §84.808(18)(B)

"

_____ _____

Buyer Date Seller Date

_____

Co-Buyer Date

THIS CONTRACT IS NOT VALID UNTIL YOU AND I SIGN IT."

Figure: 7 TAC §84.808(21)

"You will apply my payments in the following order:

1. earned but unpaid finance charge; and
2. anything else I owe under this agreement."

Figure: 7 TAC §84.808(31)

"To secure all I owe on this contract and all my promises in it, I give you a security interest in:

- the motor vehicle including all accessories and parts now or later attached (Optional: and any other goods financed in this contract);
- all insurance proceeds and other proceeds received for the motor vehicle;
- any insurance policy, service contract or other contract financed by you and any proceeds of those contracts; and
- any refunds of charges included in this contract for insurance, or service contracts.

This security interest also secures any extension or modification of this contract. The certificate of title must show your security interest in the motor vehicle."

Figure: 7 TAC §84.808(34)(A)

"I will be in default if:

- I do not pay any amount when it is due;
- I break any of my promises in this agreement;
- I allow a judgment to be entered against me or the collateral; or
- I file bankruptcy, bankruptcy is filed against me, or the motor vehicle becomes involved in a bankruptcy.

If I default, you can exercise your rights under this contract and your other rights under the law."

Figure: 30 TAC §290.47(i)

Appendix I: Assessment of Hazards and Selection of Assemblies

The following table lists many common hazards. It is not an all-inclusive list of the hazards which may be found connected to public water systems.

Premises Isolation: Description of Premises	Assessment of Hazard	Required Assembly
Aircraft and missile plants	Health	RPBA or AG
Animal feedlots	Health	RPBA or AG
Automotive plants	Health	RPBA or AG
Breweries	Health	RPBA or AG
Canneries, packing houses and rendering plants	Health	RPBA or AG
Commercial car wash facilities	Health	RPBA or AG
Commercial laundries	Health	RPBA or AG
Cold storage facilities	Health	RPBA or AG
Connection to sewer pipe	Health	RPBA or AG
Dairies	Health	RPBA or AG
Docks and dockside facilities	Health	RPBA or AG
Dye works	Health	RPBA or AG
Food and beverage processing plants	Health	RPBA or AG
Hospitals, morgues, mortuaries, medical clinics, dental clinics, veterinary clinics, autopsy facilities, sanitariums, and medical labs	Health	RPBA or AG
Metal manufacturing, cleaning, processing, and fabrication plants	Health	RPBA or AG
Microchip fabrication facilities	Health	RPBA or AG
Paper and paper products plants	Health	RPBA or AG
Petroleum processing or storage facilities	Health	RPBA or AG
Photo and film processing labs	Health	RPBA or AG
Plants using radioactive material	Health	RPBA or AG

Plating or chemical plants	Health	RPBA or AG
Pleasure-boat marinas	Health	RPBA or AG
Private/Individual/Unmonitored wells	Health	RPBA or AG
Rainwater harvesting system	Health	RPBA or AG
Reclaimed water systems	Health	RPBA or AG
Restricted, classified or other closed facilities	Health	RPBA or AG
Rubber plants	Health	RPBA or AG
Sewage lift stations	Health	RPBA or AG
Sewage treatment plants	Health	RPBA or AG
Slaughter houses	Health	RPBA or AG
Steam plants	Health	RPBA or AG
Tall buildings or elevation differences where the highest outlet is 80 feet or more above the meter	Nonhealth	DCVA

Internal Protection - Description of Cross-Connection	Assessment of Hazard	Required Assembly
Aspirators	Nonhealth†	AVB
Aspirator (medical)	Health	AVB or PVB
Autoclaves	Health	RPBA
Autopsy and mortuary equipment	Health	AVB or PVB
Bedpan washers	Health	AVB or PVB
Connection to industrial fluid systems	Health	RPBA
Connection to plating tanks	Health	RPBA
Connection to salt-water cooling systems	Health	RPBA
Connection to sewer pipe	Health	AG
Cooling towers with chemical additives	Health	AG
Cuspidors	Health	AVB or PVB
Degreasing equipment	Nonhealth†	DCVA

Domestic space-heating boiler	Nonhealth†	RPBA
Dye vats or machines	Health	RPBA
Fire-fighting system (toxic liquid foam concentrates)	Health	RPBA
Flexible shower heads	Nonhealth†	AVB or PVB
Heating equipment		
Commercial	Nonhealth†	RPBA
Domestic	Nonhealth†	DCVA
Hose bibs	Nonhealth†	AVB
Irrigation systems		
with chemical additives	Health	RPBA
without chemical additives	Nonhealth†	DCVA, AVB, or PVB
Kitchen equipment - Commercial	Nonhealth†	AVB
Lab bench equipment	Health or Nonhealth†	AVB or PVB
Ornamental fountains	Health	AVB or PVB
Swimming pools		
Private	Nonhealth†	PVB or AG
Public	Nonhealth†	RPBA or AG
Sewage pump	Health	AG
Sewage ejectors	Health	AG
Shampoo basins	Nonhealth†	AVB
Specimen tanks	Health	AVB or PVB
Steam generators	Nonhealth†	RPBA
Steam tables	Nonhealth†	AVB
Sterilizers	Health	RPBA
Tank vats or other vessels containing toxic substances	Health	RPBA
Trap primers	Health	AG
Vending machines	Nonhealth†	RPBA or PVB
Watering troughs	Health	AG or PVB

NOTE: AG = air gap; AVB = atmospheric vacuum breaker; DCVA = double check valve backflow prevention assembly; PVB = pressure vacuum breaker; RPBA = reduced-pressure principle backflow prevention assembly.

*AVBs and PVBs may be used to isolate health hazards under certain conditions, that is, backsiphonage situations. Additional area of premises isolation may be required.

†Where a greater hazard exists (due to toxicity or other potential health impact) additional area protection with RPBAs is required.

IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

Comptroller of Public Accounts

Notice of Request for Proposals

Pursuant to Chapter 54, Subchapters F, G and H, Texas Education Code, the Comptroller of Public Accounts (Comptroller), on behalf of the Texas Prepaid Higher Education Tuition Board (Board), issues this Request for Letter Proposals (RFP) from qualified, independent law firms to serve as outside counsel to the Board. The Board administers the state's prepaid higher education tuition program, known as the Texas Guaranteed Tuition Plan and the state's higher education savings plans, known as the Lonestar 529 Plan and the Texas College Savings Plan, as well as the Texas Tomorrow Fund II. The Funds are qualified tuition programs authorized under §529 of the Internal Revenue Code. Under this RFP, the Board shall select qualified counsel to provide the Board with legal services on an as-need, as-requested basis in a variety of general civil matters requiring expertise in federal taxation, corporate, contracts, securities, finance, family, intellectual property, and administrative law. The Board estimates that it will evaluate respondents and announce a contract award or awards no later than August 31, 2008, or as soon thereafter as practical. Clark, Thomas & Winters, P.C., currently serves as legal counsel to the Board, and its contract with the Board expires on August 31, 2008. Respondents must be able to begin providing services on an as-needed basis on September 1, 2008, and throughout the expected initial contract term - September 1, 2008 through August 31, 2009 with two (2) options to renew at the Board's sole option, for one (1) year periods exercised one (1) year at a time.

Questions and Proposed Contract: Questions concerning this RFP and requests for copies of the proposed sample contract must be in writing and submitted via hand delivery or facsimile no later than Friday, May 16, 2008, 2:00 p.m., Central Zone Time (CZT) to William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, 111 East 17th Street, Room G-24, Austin, Texas, 78774, telephone number: (512) 305-8673, facsimile: (512) 463-3669. The sample contract will be available upon request. The Comptroller's official response to questions received by the above deadline will be posted as an addendum to the Electronic State Business Daily (ESBD) notice on Friday, May 23, 2008, or as soon thereafter as practical.

Closing Date: An original and ten (10) copies of each Letter Proposal must be delivered to and received in the Office of the Assistant General Counsel, Contracts, at the address specified above no later than 2:00 p.m. CZT, on Friday, May 30, 2008. Proposals received after this date and time will not be considered. Respondents shall be solely responsible for confirming the timely receipt of proposals; late proposals will not be considered.

Content: Letter Proposals must include all of the following information in order to be considered:

1. Transmittal letter that: (a) describes specific experience and qualifications of both the Law Firm and each proposed partner and associate in each of the requisite areas of practice, particularly highlighting recent experience in representing governmental entities in similar matters involving qualified tuition programs; (b) outlines the Law Firm's understanding of the Board's enabling legislation, administrative rules, and related law, including Chapter 54, Subchapters F, G and H, Texas Education Code; Title 34, Part 1, Chapter 7, Texas Administrative Code; and §529, Internal Revenue Code; (c) details the Law Firm's ability to attend and make presentations at Board meetings and meetings with the Comptroller's staff in Austin, Texas; and (d) describes the Law Firm's ability to quickly respond to Board requests for research and legal advice with regard to the varied areas of law detailed in the first paragraph of this RFP;

2. Physical address of Law Firm's Texas offices, if any, and the physical address of the Law Firm's office that will have primary responsibility for any contract resulting from this RFP;

3. Vita for each proposed partner and associate who will provide services under the contract, if the Board makes a contract award under this RFP;

4. Proposed hourly rates for each proposed partner and associate and statements as to: (a) whether proposed fees are negotiable; (b) how proposed fees compare to recently contracted fees with other governmental entities on similar matters, if any; (c), proposed reimbursement basis for out-of-pocket expenses other than travel; and (d) whether proposed fees are firm throughout the expected initial contract term (September 1, 2008 through August 31, 2009);

5. Proposed mechanisms to control and communicate regarding total costs such as providing the Board with estimates of billable costs prior to beginning specific assignments and timely advising the Board when additional work is required to complete those assignments;

6. Disclosures of actual and potential conflicts of interest, if any, including but not limited to identifying each and every matter in which the Law Firm has, within the past calendar year, represented any entity or individual with an interest adverse to the Board or to the State of Texas, or any of its boards, agencies, commissions, universities or elected or appointed officials;

7. Information regarding efforts made by the Law Firm to encourage and develop the participation of minorities and women in the provision of services such as those requested by this RFP; and

8. Confirmation of willingness to comply with the policies, directives and guidelines of the Board and the Comptroller.

Evaluation and Award Procedure: All qualifying Letter Proposals received by the above deadline will be evaluated based on qualifications, experience and reasonableness of contracted fees. The Board will make the final selection in its sole discretion in the best interests of the Funds and the State of Texas. Notice of contract award will be published on the Electronic State Business Daily (ESBD) and in the *Texas Register* as soon as possible after contract signature.

Limitations: The Board reserves the right to accept or reject any or all Letter Proposals submitted in response to this RFP. The Board is not obligated to make any award or execute any contract as a result of issuing this RFP. The Board shall pay no costs or any other amounts incurred by any entity in responding to this RFP. The selected Law Firm's sole compensation shall be limited to contracted amounts in the final negotiated contract; no minimum amount of work is guaranteed. No travel expenses or reimbursement will be paid. The Comptroller

and the Board may solicit or select other legal counsel to provide the same or similar services at any time.

Summary of Schedule: The anticipated schedule is as follows: Issuance of RFP - Friday, May 2, 2008, after 10:00 a.m. CZT; Questions and Request for Copies of Sample Contract Due - Friday, May 16, 2008, 2:00 p.m. CZT; Electronic Posting of Official Response to Questions posted - Friday, May 23, 2008, or as soon thereafter as practical; Proposals Due - Friday, May 30, 2008, 2:00 p.m. CZT; Contract Execution and initiation of transition, if any, - September 1, 2008, or as soon thereafter as practical; Contract Effective - September 1, 2008, or as soon thereafter as practical.

TRD-200802132
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: April 23, 2008

♦ ♦ ♦

Notice of Request for Proposals

Pursuant to Chapter 2254, Subchapter B, Texas Government Code, and Chapter 54, Subchapters F, G and H, Texas Education Code, the Comptroller of Public Accounts (Comptroller) on behalf of the Texas Prepaid Higher Education Tuition Board (Board) announces its Request for Proposals (RFP #185a) for the purpose of obtaining investment consulting services for the Board. The selected consultant (Consultant) will advise and assist the Board and Comptroller in administering all of the Board's investment activities related to the Texas Tomorrow Funds (Funds). The Funds include the Texas Tomorrow Fund I, the Texas College Savings Plan and Lonestar 529 Plan, and the Texas Tomorrow Fund II Unit Undergraduate Prepaid Tuition Program. The Comptroller, as Chair and Executive Director of the Board, is issuing this RFP on behalf of the Board so that the Board may move forward with retaining the necessary investment consultant. The Comptroller and the Board reserve the right to award more than one contract under the RFP. If approved by the Board, the Consultant will be expected to begin performance of the contract on or about September 1, 2008, or as soon thereafter as practical.

Contact: Parties interested in submitting a proposal should contact William Clay Harris, Assistant General Counsel, Contracts, Comptroller of Public Accounts, in the Issuing Office at: 111 East 17th Street, Room G-24, Austin, Texas 78774, (512) 305-8673, to obtain a complete copy of the RFP. The Comptroller will mail copies of the RFP only to those parties specifically requesting a copy. The RFP will be available for pick-up at the above referenced address on Friday, May 2, 2008, after 10:00 a.m. Central Zone Time (CZT) and during normal business hours thereafter. The Comptroller will also make the entire RFP available electronically on the Electronic State Business Daily (ESBD) at: http://esbd.cpa.state.tx.us after 10:00 a.m. CZT on Friday, May 2, 2008.

Questions and Non-Mandatory Letters of Intent: All written inquiries, questions, and Non-mandatory Letters of Intent to propose must be received at the above-referenced address not later than 2:00 p.m. CZT on Monday, May 19, 2008. Prospective proposers are encouraged to fax non-mandatory Letters of Intent and Questions to (512) 463-3669 to ensure timely receipt. Non-mandatory Letters of Intent must be addressed to William Clay Harris, Assistant General Counsel, Contracts, and must contain the information as stated in the corresponding Section of the RFP and be signed by an official of that entity. On or about Friday, May 23, 2008, the Comptroller expects to post responses to questions on the ESBD. Late Non-mandatory Letters of Intent and Questions will not be considered under any circumstances. Respondents shall be solely responsible for verifying timely receipt of Non-Mandatory Letters of Intent and Questions in the Issuing Office.

Closing Date: Proposals must be delivered in the Issuing Office to the attention of the Assistant General Counsel, Contracts, no later than 2:00 p.m. CZT, on Friday, May 30, 2008. Late Proposals will not be considered under any circumstances. Respondents shall be solely responsible for verifying time receipt of Proposals in the Issuing Office.

Evaluation Criteria: Proposals will be evaluated under the evaluation criteria outlined in the RFP. The Board and Comptroller will make the final decision.

The Comptroller and the Board each reserve the right to accept or reject any or all proposals submitted. The Comptroller and the Board are not obligated to execute a contract on the basis of this notice or the distribution of any RFP. The Comptroller and the Board shall not pay for any costs incurred by any entity in responding to this Notice or to the RFP.

The anticipated schedule of events pertaining to this solicitation is as follows: Issuance of RFP - May 2, 2008, after 10:00 a.m. CZT; Non-Mandatory Letters of Intent and Questions Due - May 19, 2008, 2:00 p.m. CZT; Official Responses to Questions posted - May 23, 2008; Proposals Due - May 30, 2008, 2:00 p.m. CZT; Contract Execution - August 31, 2008, or as soon thereafter as practical; Commencement of Work - September 1, 2008.

TRD-200802133
William Clay Harris
Assistant General Counsel, Contracts
Comptroller of Public Accounts
Filed: April 23, 2008

♦ ♦ ♦

Office of Consumer Credit Commissioner

Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.009, and 304.003 of the Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/28/08 - 05/04/08 is 18% for Consumer[1]/Agricultural/Commercial[2]/credit through $250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 04/28/08 - 05/04/08 is 18% for Commercial over $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 05/01/08 - 05/31/08 is 5.25% for Consumer/Agricultural/Commercial/credit through $250,000.

The judgment ceiling as prescribed by §304.003 for the period of 05/01/08 - 05/31/08 is 5.25% for Commercial over $250,000.

[1]Credit for personal, family or household use.

[2]Credit for business, commercial, investment or other similar purpose.

TRD-200802115
Leslie L. Pettijohn
Commissioner
Office of Consumer Credit Commissioner
Filed: April 22, 2008

♦ ♦ ♦

Court of Criminal Appeals

Availability of Grant Funds

The Court of Criminal Appeals announces the availability of funds to be provided in the form of grants to entities for the purpose of providing continuing legal education courses, programs, and technical assistance projects for: prosecutors, prosecutor office personnel, criminal defense attorneys who regularly represent indigent defendants in criminal matters, clerks, judges, and other court personnel of the appellate courts, district courts, county courts at law, county courts, justice courts and municipal courts of this State, or other persons as provided by statute. Funds are subject to the provisions of Chapter 56 of the Texas Government Code and the General Appropriations Bill (HB 1) 80th Legislature Regular Session. The grant period is September 1, 2008 through August 31, 2009. The deadline for applications is May 31, 2008. Applicants may request an application packet by phone, mail, or in person. The phone number is (512) 475-2312, and the address is: Court of Criminal Appeals, Judicial Education Program, 201 W. 14th Street, Austin, Texas 78701.

The Court of Criminal Appeals also announces the availability of $150,000 in funding to be provided in the form of grants to entities for the purpose of providing continuing legal education courses, programs, and technical assistance projects on actual innocence for; criminal defense attorneys, prosecuting attorneys, judges, law enforcement officers, law students, bailiffs, constables, warrant officers, or other persons as provided by statute. Funds are subject to the provisions of Chapter 56 of the Texas Government Code and the General Appropriations Bill (HB 1) 80th Legislature Regular Session, Article IV, page IV-6, rider 8. The grant period is September 1, 2008 through August 31, 2009. The deadline for applications is May 31, 2008. Applicants may request an application packet by phone, mail, or in person. The phone number is (512) 475-2312, and the address is: Court of Criminal Appeals, Judicial Education Program, 201 W. 14th Street, Austin, Texas 78701.

TRD-200802003
Louise Pearson
Clerk of the Court
Court of Criminal Appeals
Filed: April 16, 2008

♦ ♦ ♦

Commission on State Emergency Communications

Notice of Workshop Regarding Rules §251.2 and §251.7

The Commission on State Emergency Communications (CSEC) will hold a workshop regarding §251.2, relating to Guidelines for Changing or Extending 9-1-1 Service Arrangements, and §251.7, relating to Guidelines for Implementing Integrated Services on Thursday, May 15, 2008, from 1:00 p.m. to 4:00 p.m., at the Texas Real Estate Commission, 1101 Camino La Costa, Austin, Texas 78752, Room 235.

The primary purpose of the workshop is to get service provider input regarding Regional Internet Protocol (IP) Network to Interconnect Public Safety Answering Points (PSAPs).

The workshop agenda is as follows:

I. Welcoming Remarks by CSEC Staff

II. Review Written Comments

III. Open Discussion

IV. Closing

Additional information, including the questions for comment and filed comments, is available on CSEC's website in the "What's New at CSEC" section. Questions concerning the workshop or this notice should be referred to Susan Seet at (512) 305-6917 or susan.seet@csec.state.tx.us. Persons planning on participating in the workshop, please register by contacting Elizabeth Smith at (512) 305-6928 or elizabeth.smith@csec.state.tx.us. Hearing and speech-impaired individuals with a telecommunications device for the deaf may contact CSEC at (512) 305-6925.

NOTE: CSEC will not be broadcasting the workshop or allowing telephonic participation.

TRD-200802149
Patrick Tyler
General Counsel
Commission on State Emergency Communications
Filed: April 23, 2008

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Texas Commission on Environmental Quality

Agreed Orders

The Texas Commission on Environmental Quality (TCEQ or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (the Code), §7.075. Section 7.075 requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. Section 7.075 requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **June 2, 2008**. Section 7.075 also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the commission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-1864 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be **received by 5:00 p.m. on June 2, 2008**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, §7.075 provides that comments on the AOs shall be submitted to the commission in **writing**.

(1) COMPANY: Chevron Phillips Chemical Company LP; DOCKET NUMBER: 2007-2025-AIR-E; IDENTIFIER: RN102018322; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §101.20(1), 40 Code of Federal Regulations (CFR) §60.8(a), and THSC, §382.085(b), by failing to conduct initial compliance testing; PENALTY: $4,300; ENFORCEMENT COORDINATOR: Trina Grieco, (210) 490-3096; REGIONAL OFFICE: 5424 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(2) COMPANY: Citation Corporation; DOCKET NUMBER: 2007-1952-AIR-E; IDENTIFIER: RN100218288; LOCATION: Lufkin, Angelina County, Texas; TYPE OF FACILITY: foundry; RULE VIO-

LATED: 30 TAC §122.121 and §122.241(b) and THSC, §382.082(b), by failing to submit a permit renewal application; PENALTY: $13,300; Supplemental Environmental Project (SEP) offset amount of $5,320 applied to Angelina Beautiful Clean; ENFORCEMENT COORDINATOR: Aaron Houston, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(3) COMPANY: Copano Processing, L.P.; DOCKET NUMBER: 2008-0010-AIR-E; IDENTIFIER: RN101271419; LOCATION: Sheridan, Colorado County, Texas; TYPE OF FACILITY: gas processing plant; RULE VIOLATED: 30 TAC §116.115(c), TCEQ Air Permit Number 56613, Special Condition (SC) Number 1, and THSC, §382.085(b), by failing to comply with the 0.32 pound/hour volatile organic compound emissions limits; PENALTY: $20,850; Supplemental Environmental Project (SEP) offset amount of $8,340 applied to Lower Colorado River Authority's Household Hazardous Waste and Reusable Materials Collection; ENFORCEMENT COORDINATOR: Roshondra Lowe, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(4) COMPANY: E. I. du Pont de Nemours and Company; DOCKET NUMBER: 2008-0037-AIR-E; IDENTIFIER: RN100542711; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §116.115(b)(2)(F) and (c) and §122.143(3), Federal Operating Permit (FOP) O-2055, General Terms and Conditions (GTC), and SC 8, New Source Review (NSR) Permit 20204, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $3,675; ENFORCEMENT COORDINATOR: Aaron Houston, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(5) COMPANY: E. I. du Pont de Nemours and Company; DOCKET NUMBER: 2007-1755-PWS-E; IDENTIFIER: RN100542711; LOCATION: Orange, Orange County, Texas; TYPE OF FACILITY: petrochemical refining facility with a surface water treatment plant that is a public water system; RULE VIOLATED: 30 TAC §290.110(b)(1)(A) and (f)(4), by failing to provide at least a 0.5 inactivation of *Giardia Lamblia* cyst and a 2-log inactivation of viruses; 30 TAC §290.111(e)(1)(B) and (e)(1)(A) (formerly §290.111(b)(1)(A)(i), (A)(ii), and (f)(5)), by failing to maintain the combined filter effluent turbidity at 0.3 nephelometric turbidity units (NTU) or less in at least 95% of the samples tested and failed to maintain the combined filter effluent below one NTU; and 30 TAC §290.111(e)(3)(A) (formerly §290.111(c)(1)(A) and (f)(2)), by failing to measure and record the turbidity level of the combined filter effluent at least once each day; PENALTY: $5,792; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(6) COMPANY: E. I. du Pont de Nemours and Company; DOCKET NUMBER: 2007-2044-AIR-E; IDENTIFIER: RN100216035; LOCATION: Nederland, Jefferson County, Texas; TYPE OF FACILITY: chemical plant; RULE VIOLATED: 30 TAC §§113.120, 115.112(a)(1), 116.115(c), and 122.143(4), 40 CFR §63.120(d)(5), Federal Operating Permit (FOP) O-01960, GTC, SC 1A, 1E, 4, and 19, NSR Permit 1743, SC 2 and 10, and THSC, §382.085(b), by failing to maintain minimum water flow rate; and 30 TAC §122.143(4) and §122.145(2)(C), FOP O-01950, GTC, SC 2F, and THSC, §382.085(b), by failing to submit a semi-annual deviation report; PENALTY: $30,625; ENFORCEMENT COORDINATOR: Aaron Houston, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(7) COMPANY: East TeXas MillworXs, Inc. dba Seal Moulding; DOCKET NUMBER: 2008-0237-MLM-E; IDENTIFIER: RN105337802; LOCATION: College Station, Brazos County, Texas; TYPE OF FACILITY: wood molding manufacturing plant; RULE VIOLATED: 30 TAC §111.201 and §330.15 and THSC, §382.085(b), by failing to prevent unauthorized outdoor burning; PENALTY: $1,661; ENFORCEMENT COORDINATOR: Samuel Short, (512) 239-5363; REGIONAL OFFICE: 6801 Sanger Avenue, Suite 2500, Waco, Texas 76710-7826, (254) 751-0335.

(8) COMPANY: Enviroplan Architects-Planners Austin, Inc.; DOCKET NUMBER: 2008-0315-EAQ-E; IDENTIFIER: RN105379879; LOCATION: Sunset Valley, Travis County, Texas; TYPE OF FACILITY: commercial office construction site; RULE VIOLATED: 30 TAC §213.4(a)(1), by failing to obtain approval of a Edwards Aquifer Water Pollution Abatement Plan prior to beginning a regulated activity over the Edwards Aquifer Recharge Zone; PENALTY: $2,625; ENFORCEMENT COORDINATOR: Lauren Smitherman, (512) 239-5223; REGIONAL OFFICE: 2800 South IH 35, Suite 100, Austin, Texas 78704-5712, (512) 339-2929.

(9) COMPANY: First Texas Homes, Inc.; DOCKET NUMBER: 2008-0458-WQ-E; IDENTIFIER: RN105447536; LOCATION: Collin County, Texas; TYPE OF FACILITY: housing development; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(10) COMPANY: First Texas Homes, Inc.; DOCKET NUMBER: 2008-0459-WQ-E; IDENTIFIER: RN105447544; LOCATION: Collin County, Texas; TYPE OF FACILITY: housing development; RULE VIOLATED: 30 TAC §281.25(a)(4), by failing to obtain a construction general permit; PENALTY: $700; ENFORCEMENT COORDINATOR: Melissa Keller, (512) 239-1768; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(11) COMPANY: Dale Gold dba Gold Egg Farm; DOCKET NUMBER: 2007-1891-AGR-E; IDENTIFIER: RN101981785; LOCATION: Moulton, Lavaca County, Texas; TYPE OF FACILITY: egg-laying business; RULE VIOLATED: 30 TAC §321.21(a) and the Code, §26.121(a), by failing to prevent an unauthorized discharge of chicken manure; PENALTY: $1,050; ENFORCEMENT COORDINATOR: Merrilee Hupp, (512) 239-4490; REGIONAL OFFICE: 6300 Ocean Drive, Suite 100, Corpus Christi, Texas 78412-5503, (361) 825-3100.

(12) COMPANY: Houston County Water Control and Improvement District Number 1; DOCKET NUMBER: 2008-0264-PWS-E; IDENTIFIER: RN101201002; LOCATION: Houston County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.111(e)(1)(A) and (B), by exceeding the turbidity level of the combined filter effluent of 0.3 NTU in more than 5% of the samples tested and exceeded the turbidity level of the combined filter effluent of one NTU; PENALTY: $3,900; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(13) COMPANY: Huntsman Petrochemical Corporation; DOCKET NUMBER: 2007-2006-AIR-E; IDENTIFIER: RN100219252; LOCATION: Port Neches, Jefferson County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), NSR Permit 5972A, SC 1, and FOP O-1320, GTC, and SC 13A, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §101.201(a)(1) and §122.143(4), FOP O-1322, GTC, and SC 2F, and THSC, §382.085(b), by failing to properly report an unauthorized emissions event; 30 TAC §116.115(c) and §122.143(4), NSR Permit 20160, SC 1, FOP O-1322, GTC, and SC 17A, and THSC, §382.085(b), by failing to prevent unauthorized

emissions; 30 TAC §116.115(c) and §122.143(4), NSR Permit 20160, FOP O-1322, GTC, and SC 17, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $29,482; Supplemental Environmental Project (SEP) offset amount of $14,741 applied to Texas Association of Resource Conservation and Development Areas, Inc. ("RC&D") - Clean School Buses; ENFORCEMENT COORDINATOR: Aaron Houston, (409) 898-3838; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(14) COMPANY: INEOS USA LLC; DOCKET NUMBER: 2008-0266-AIR-E; IDENTIFIER: RN100238708; LOCATION: Alvin, Brazoria County, Texas; TYPE OF FACILITY: petrochemical plant; RULE VIOLATED: 30 TAC §101.20(3) and §116.715(a), NSR Permit Number 95/PSD-TX-854, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $10,000; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(15) COMPANY: ISP Technologies, Inc.; DOCKET NUMBER: 2007-1839-AIR-E; IDENTIFIER: RN100825272; LOCATION: Texas City, Galveston County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), NSR Permit 55847, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §116.115(c), NSR Permit 22079, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $14,000; ENFORCEMENT COORDINATOR: James Nolan, (512) 239-6634; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(16) COMPANY: Ivan's Pumping Service, Inc.; DOCKET NUMBER: 2008-0244-MLM-E; IDENTIFIER: RN103149456; LOCATION: El Paso, El Paso County, Texas; TYPE OF FACILITY: sludge transporter company; RULE VIOLATED: 30 TAC §312.143 and §330.15(c), by failing to prevent unauthorized dumping or disposal of municipal solid waste (MSW); PENALTY: $950; ENFORCEMENT COORDINATOR: Rebecca Johnson, (713) 767-3500; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1206, (915) 834-4949.

(17) COMPANY: City of Munday; DOCKET NUMBER: 2007-1582-MWD-E; IDENTIFIER: RN103016192; LOCATION: Knox County, Texas; TYPE OF FACILITY: wastewater treatment plant; RULE VIOLATED: 30 TAC §305.125(1), Texas Pollutant Discharge Elimination System (TPDES) Permit Number WQ0010228002, Effluent Limitations and Monitoring Requirements Numbers 1 and 3, and the Code, §26.121(a)(1), by failing to comply with its permitted effluent limits for biochemical oxygen demand (BOD), total suspended solids, and pH; 30 TAC §305.125(5) and §317.3(a) and TPDES Permit Number WQ0010228002, Operational Requirements Number 1, by failing to ensure that all systems of collection, treatment, and disposal are properly maintained and operated; 30 TAC §319.11(c) and TPDES Permit Number WQ0010228002, Monitoring and Reporting Requirements Number 2, by failing to properly calibrate and maintain the dissolved oxygen (DO) meter; 30 TAC §319.6 and TPDES Permit Number WQ0010228002, Monitoring and Reporting Requirements Number 2, by failing to properly analyze effluent samples; and 30 TAC §305.125(1) and §319.11(c) and TPDES Permit Number WQ0010228002, Monitoring and Reporting Requirements Number 2, by failing to accurately determine loading calculations and correctly report self-reported effluent data; PENALTY: $44,400; Supplemental Environmental Project (SEP) offset amount of $35,520 applied to conducting a series of collection and recycling events; ENFORCEMENT COORDINATOR: Pamela Campbell, (512) 239-4493; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(18) COMPANY: Munsell Construction, Inc.; DOCKET NUMBER: 2008-0196-MLM-E; IDENTIFIER: RN101643880; LOCATION: Mason County, Texas; TYPE OF FACILITY: farm and ranch improvement business; RULE VIOLATED: 30 TAC §324.6 and 40 CFR §279.22(c), by failing to label or clearly mark containers used to store used oil; 30 TAC §330.15(a)(1), by failing to prevent the unauthorized discharge of MSW; and 30 TAC §334.127(d), by failing to provide written notice to the agency of any changes or additional information concerning the status of the aboveground storage tanks; PENALTY: $2,355; ENFORCEMENT COORDINATOR: Colin Barth, (512) 239-0086; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7013, (915) 655-9479.

(19) COMPANY: National Oilwell Varco, L.P.; DOCKET NUMBER: 2007-2023-AIR-E; IDENTIFIER: RN100213024; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: surface coating; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), Air Permit Number 4908, SC 1, Air Operating Permit Number O-01818, SC 6, and THSC, §382.085(b), by failing to operate within permitted emission limits; 30 TAC §116.115(c) and §122.143(4), Air Permit Number 4908, SC 11(E), Air Operating Permit Number O-01818, SC 6, and THSC, §382.085(b), by failing to maintain records of thermal oxidizer temperatures; and 30 TAC §116.115(c) and §122.143(4), Air Permit Number 4908, SC 11(B)(2), Air Operating Permit Number O-01818, SC 6, and THSC, §382.085(b), by failing to keep complete records of coating operations; PENALTY: $12,445; ENFORCEMENT COORDINATOR: Audra Ruble, (361) 825-3100; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(20) COMPANY: Pasadena Refining System, Inc.; DOCKET NUMBER: 2008-0050-AIR-E; IDENTIFIER: RN100716661; LOCATION: Pasadena, Harris County, Texas; TYPE OF FACILITY: petroleum refinery; RULE VIOLATED: 30 TAC §116.115(c), TCEQ Permit Number 76192, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $20,000; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(21) COMPANY: Bill Phillips dba Scrub-A-Dubb Barrel Company; DOCKET NUMBER: 2007-1088-IHW-E; IDENTIFIER: RN100583236; LOCATION: Lubbock, Lubbock County, Texas; TYPE OF FACILITY: barrel cleaning and refurbishment; RULE VIOLATED: 30 TAC §327.5(a), by failing to prevent and immediately abate and contain a spill or discharge of oily industrial waste; 30 TAC §327.5(a) and §335.4(1) and the Code, §26.121(a), by failing to prevent and immediately abate and contain a spill or discharge of oily industrial waste and failed to prevent the discharge of hazardous waste into or adjacent to water in the state; and 30 TAC §327.3(b) and §327.5(c), by failing to notify the agency within 24 hours after the discovery of spill or discharge and failed to submit a 30-day report describing the details of the discharge and supporting the adequacy of the response action; PENALTY: $10,350; ENFORCEMENT COORDINATOR: Colin Barth, (512) 239-0086; REGIONAL OFFICE: 4630 50th Street, Suite 600, Lubbock, Texas 79414-3520, (806) 796-7092.

(22) COMPANY: Walter Lloyd Smith, Sr.; DOCKET NUMBER: 2007-1685-PST-E; IDENTIFIER: RN101820793; LOCATION: Roscoe, Nolan County, Texas; TYPE OF FACILITY: property with five inactive underground storage tanks (USTs); RULE VIOLATED: 30 TAC §334.7(a)(1), by failing to register with the commission, on authorized commission forms, USTs in existence on or after September 1, 1987; and 30 TAC §334.47(a)(2), by failing to permanently remove from service, no later than 60 days after the prescribed upgrade implementation date, five USTs for which any applicable component

of the system is not brought into timely compliance with the upgrade requirements; PENALTY: $28,600; ENFORCEMENT COORDINATOR: Wallace Myers, (512) 239-6580; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(23) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-0043-AIR-E; IDENTIFIER: RN104964267; LOCATION: Port Neches, Jefferson County, Texas; TYPE OF FACILITY: industrial organic chemicals; RULE VIOLATED: 30 TAC §116.115(c) and §122.143(4), FOP Number O-01327, GTC and SC 15, Air Permit Number 20485, SC 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $3,600; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1892, (409) 898-3838.

(24) COMPANY: Texas Petrochemicals LP; DOCKET NUMBER: 2008-0260-AIR-E; IDENTIFIER: RN100219526; LOCATION: Houston, Harris County, Texas; TYPE OF FACILITY: chemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 46307, SC Number 1, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: $7,075; Supplemental Environmental Project (SEP) offset amount of $2,830 applied to Harris County Public Health and Environmental Services-Pollution Control Division's Fourier Transform Infra Red (FTIR) Project; ENFORCEMENT COORDINATOR: Nadia Hameed, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(25) COMPANY: TOTAL PETROCHEMICALS USA, INC.; DOCKET NUMBER: 2008-0162-AIR-E; IDENTIFIER: RN100212109; LOCATION: La Porte, Harris County, Texas; TYPE OF FACILITY: petrochemical manufacturing plant; RULE VIOLATED: 30 TAC §116.115(c), Air Permit Number 21538, SC Number 6, and THSC, §382.085(b), by failing to prevent unauthorized emissions; 30 TAC §116.615(2), Standard Permit Number 78962, Maximum Emission Rates Table, and THSC, §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §101.201(b) and THSC, §382.085(b), by failing to properly notify the TCEQ of an emissions event; PENALTY: $25,764; ENFORCEMENT COORDINATOR: Kimberly Morales, (713) 767-3500; REGIONAL OFFICE: 5425 Polk Avenue, Suite H, Houston, Texas 77023-1486, (713) 767-3500.

(26) COMPANY: Town of Windom; DOCKET NUMBER: 2007-1855-MWD-E; IDENTIFIER: RN103014619; LOCATION: Fannin County, Texas; TYPE OF FACILITY: wastewater treatment; RULE VIOLATED: 30 TAC §305.125(1), TPDES Permit Number 10666001, Final Effluent Limitations and Monitoring Requirements Number 1, 3, and 6, and the Code, §26.121(a), by failing to comply with permitted effluent limits for five-day BOD, pH, and DO; PENALTY: $9,960; ENFORCEMENT COORDINATOR: Tom Jecha, (512) 239-2576; REGIONAL OFFICE: 2301 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(27) COMPANY: City of Tyler; DOCKET NUMBER: 2007-1900-PWS-E; IDENTIFIER: RN101385870; LOCATION: Tyler, Smith County, Texas; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §290.46(d)(2)(B), by failing to operate the disinfection equipment to maintain a minimum disinfectant residual of 0.5 milligrams per liter; and 30 TAC §290.110(c)(4)(B), by failing to monitor the disinfectant residual at representative locations throughout the distribution system; PENALTY: $5,295; ENFORCEMENT COORDINATOR: Tel Croston, (512) 239-5717; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3756, (903) 535-5100.

(28) COMPANY: City of Wichita Falls; DOCKET NUMBER: 2007-1752-MSW-E; IDENTIFIER: RN103049557; LOCATION: Wichita Falls, Wichita County, Texas; TYPE OF FACILITY: type I MSW landfill; RULE VIOLATED: 30 TAC §330.121(a) and MSW Permit Number 1428A, Part III, Attachment 15, Section 2.2.1, by failing to comply with the approved site operating plan; PENALTY: $15,100; ENFORCEMENT COORDINATOR: Cynthia McKaughan, (512) 239-0735; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

(29) COMPANY: Zee Smoke Inc. dba Lucky Stop; DOCKET NUMBER: 2008-0006-PST-E; IDENTIFIER: RN102784451; LOCATION: Nederland, Jefferson County, Texas; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULE VIOLATED: 30 TAC §115.242(1)(C) and THSC, §382.085(b), by failing to upgrade the Stage II equipment to onboard refueling vapor recovery compatible systems; 30 TAC §115.242(3)(A) and THSC, §382.085(b), by failing to maintain the Stage II Vapor recovery system in proper operating condition; 30 TAC §334.50(d)(1)(B)(iii)(IV) and the Code, §26.3475(c)(1), by failing to provide proper release detection; 30 TAC §334.8(c)(4)(A)(vii) and §334.8(c)(5)(B)(ii), by failing to timely renew a previously issued UST delivery certificate by submitting a properly completed UST registration or self-certification form; 30 TAC §334.8(c)(5)(A)(i) and the Code, §26.3467(a), by failing to make available to a common carrier a valid, current TCEQ delivery certificate; and 30 TAC §334.10(b) and §334.50(e)(2)(A), by failing to maintain UST release detection records and make them available for review upon request by agency personnel; PENALTY: $13,770; ENFORCEMENT COORDINATOR: Tom Greimel, (512) 239-5690; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (915) 698-9674.

TRD-200802119
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: April 22, 2008

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Notice of District Petition

Notice issued April 14, 2008.

TCEQ Internal Control No. 02082008-D03; JM Texas Land Fund No. 4 LP (the "Petitioner") filed a petition for creation of Harris County Municipal Utility District No. 476 (the "District") with the Texas Commission on Environmental Quality (TCEQ). The petition was filed pursuant to Article XVI, Section 59 of the Constitution of the State of Texas; Chapters 49 and 54 of the Texas Water Code; 30 Texas Administrative Code Chapter 293; and the procedural rules of the TCEQ. The petition states the following: (1) the Petitioner is the owner of a majority in value of the land to be included in the proposed District; (2) there are no lien holders on the property to be included in the proposed District; (3) the proposed District will contain approximately 296.29 acres located in Harris County, Texas; and (4) the proposed District is within the extraterritorial jurisdiction of the City of Houston, Texas. By Ordinance No. 2007-1235, effective November 13, 2007, the City of Houston, Texas, gave its consent to the creation of the proposed District. According to the petition, the Petitioner has conducted a preliminary investigation to determine the cost of the project and from the information available at the time, the cost of the project is estimated to be approximately $35,405,000.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office

of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

The TCEQ may grant a contested case hearing on the petition if a written hearing request is filed within 30 days after the newspaper publication of the notice. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any; (2) the name of the Petitioner and the TCEQ Internal Control Number; (3) the statement "I/we request a contested case hearing;" (4) a brief description of how you would be affected by the petition in a way not common to the general public; and (5) the location of your property relative to the proposed District's boundaries. You may also submit your proposed adjustments to the petition. Requests for a contested case hearing must be submitted in writing to the Office of the Chief Clerk at the address provided in the information section below. The Executive Director may approve the petition unless a written request for a contested case hearing is filed within 30 days after the newspaper publication of this notice. If a hearing request is filed, the Executive Director will not approve the petition and will forward the petition and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting. If a contested case hearing is held, it will be a legal proceeding similar to a civil trial in state district court. Written hearing requests should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Districts Review Team, at (512) 239-4691. Si desea información en Español, puede llamar al (512) 239-0200. General information regarding TCEQ can be found at our web site at www.tceq.state.tx.us.

TRD-200802152
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 23, 2008

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Notice of Meeting on June 5, 2008, in Odessa, Ector County, Texas Concerning the Process Instrumentation and Electrical (PIE) Facility

The purpose of the meeting is to obtain public input and information concerning the proposal of the Process Instrumentation and Electrical (PIE), Inc., facility (the facility) in Odessa, Ector County, Texas to the state registry of Superfund sites, the identification of potentially responsible parties, and the proposal of non-residential land use.

The Texas Commission on Environmental Quality (TCEQ or commission) is required under the Texas Solid Waste Disposal Act, Texas Health and Safety Code, Chapter 361, as amended (the Act), to annually publish a state registry that identifies facilities that may constitute an imminent and substantial endangerment to public health and safety or the environment due to a release or threatened release of hazardous substances into the environment. The most recent registry listing of these facilities was published in the October 5, 2007, issue of the *Texas Register* (32 TexReg 7120).

Pursuant to the Act, §361.184(a), the commission must publish a notice of intent to list a facility on the state registry of state Superfund sites in the *Texas Register* and in a newspaper of general circulation in the county in which the facility is located. With this publication, the commission hereby gives notice of a facility that the executive director has determined eligible for listing, and which the executive director proposes to list on the state registry. By this publication, the commission also gives notice pursuant to the Act, §361.1855, that it proposes a land use other than residential as appropriate for the facility identified below. The commission proposes a commercial/industrial land use designation. Determination of appropriate land use may impact the remedial investigation and remedial action for the site. The TCEQ is proposing a land use designation of commercial/industrial based on the existing land use of the property, as is prescribed in the Texas Risk Reduction Program rule in 30 Texas Administrative Code (TAC) §350.53.

This publication also specifies the general nature of the potential endangerment to public health and safety or the environment as determined by information currently available to the executive director. This notice of intent to list the facility was also published on May 2, 2008, in the *Odessa American*.

The facility proposed for listing is located within the PIE property and consists of a cinder block building where a chrome plating shop once operated. The site consists of approximately 3.832 acres and is located at 4817 Andrews Highway, Odessa, Ector County, Texas. The latitude of 31 degrees 53 minutes 23 seconds North and longitude of 102 degrees 23 minutes 18 second West are centered at the southwest corner of the property at the intersection of West 48th Street and Andrews Highway (or Highway 385). The description of the site is based on information available at the time the site was evaluated with the Hazard Ranking System (HRS). The HRS is the principal screening guide used by the commission to evaluate potential, relative risk to public health and the environment from releases or threatened releases of hazardous substances. The site description may change as additional information is gathered on the sources and extent of contamination.

The site is located in a light commercial/residential area adjacent to the Odessa city limits. It is believed a chrome plating shop operated on the site between 1964 and 1974. The property changed hands after the chrome plating operations ceased. The current owner, is Oil and Gas Construction, Inc., who previously operated an oil field-related facility at the site. The site is currently inactive.

In 1994, the Region 7 field office of the Texas Natural Resource Conservation Commission (TNRCC), predecessor agency to the TCEQ, responded to a complaint concerning a green discoloration in the PIE facility's well water located at 4817 Andrews Highway, Odessa, in Ector County. The TNRCC Region 7 sampled nine water wells for total chromium. Chromium was detected in two on-site wells above the United States Environmental Protection Agency (EPA) National Primary Drinking Water Regulations Maximum Contaminant Level (MCL) of 100 parts per billion (ppb) for total chromium (chromium (III) and chromium (VI)). In addition, two wells at 206 West 48th Street (located directly west of the PIE site) had total chromium values above the detection limit but below the MCL of 100 ppb. The remaining five wells were below detection limits.

Following a determination by the Enforcement Screening committee in 1995 that PIE was financially unable to fund the investigation and remediation, the facility was referred to the Superfund Cleanup Division for further investigation and remediation.

During December 2005 and January 2006, the TCEQ collected samples from 23 groundwater wells and detected the volatile organic compounds 1,2-dichloroethane (1,2-DCA) and tetrachloroethene (PCE), and the metal chromium in nine wells. PCE was detected between 0.50 and 630 ppb as compared to the MCL of 5 ppb; 1,2-DCA was detected between 3.64 and 11,810 ppb as compared to the MCL of 5 ppb; and chromium (VI) was detected between 22.2 ppb and 1,340 ppb as compared to the total chromium MCL of 100 ppb. Of the wells that had detections, four were residential drinking water wells and one was a commercial drinking water well. As part of

a removal action to protect human health, the TCEQ installed four filtration systems. All other residences were found to be connected to city water. To date, the TCEQ continues to quarterly monitor the groundwater contaminate-plumes and maintain the filtration systems.

A public meeting will be held at 7:00 p.m. June 5, 2008, in the Community Room at Odessa College Student Union Building, which is located at 201 West University, Odessa, Texas. The purpose of this meeting is to obtain additional information regarding the facility relative to its eligibility for listing on the state registry, identify additional potentially responsible parties, and obtain public input and information regarding the appropriate use of land on which the facility is located. The public meeting is not a contested case hearing under the Texas Administrative Procedure Act (Texas Government Code, Chapter 2001).

All persons desiring to make comments may do so prior to or at the public meeting. All comments submitted **prior** to the public meeting must be received by 5:00 p.m., **June 4, 2008, and should be sent in writing** to Diane Poteet, Project Manager, Texas Commission on Environmental Quality, Remediation Division, MC 136, P.O. Box 13087, Austin, Texas 78711-3087 or facsimile at (512) 239-2303. The public comment period for this action will end at the close of the public meeting on June 5, 2008.

A portion of the record for this site, including documents pertinent to the executive director's determination of eligibility, is available for review at the Ector County Public Library, 321 West 5th Street, Odessa, Texas, (432) 332-0633, during regular business hours. Copies of the complete public record file may be obtained during regular business hours at the commission's Records Management Center, Building E, First Floor, Records Customer Service, 12100 Park 35 Circle, Austin, Texas 78753, (800) 633-9363 or (512) 239-2920. Photocopying of file information is subject to payment of a fee. Parking for persons with disabilities is available on the east side of Building D, convenient to access ramps that are between Buildings D and E.

Information is also available regarding the state Superfund program on the TCEQ Web site at *www.tceq.state.tx.us/remediation/superfund/index.html*.

Persons with disabilities who have special communication or other accommodation needs who are planning to attend the meeting should contact Kelly Peavler at (800) 633-9363 or (512) 239-1352. Requests should be made as far in advance as possible.

For further information about the PIE proposed state Superfund site or the public meeting, please call Kelly Peavler, TCEQ Community Relations, at (800) 633-9363, extension 1352.

TRD-200802112
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: April 22, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 290

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 290, Public Drinking Water.

The proposed rulemaking would implement Section 11 of House Bill (HB) 4, HB 1391, and §2.28 of Senate Bill 3, 80th Legislature, 2007. The proposed rulemaking would establish rules for structures that are connected to a public water supply system and have a rainwater harvesting system for indoor use and establish standards for maintaining sufficient water pressure for service to fire hydrants in residential areas in municipalities with a population of 1,000,000 or more.

The commission will hold a public hearing on this proposal in Austin on May 29, 2008, at 10:00 a.m. in Building E, Room 201S, at the commission's central office located at 12100 Park 35 Circle. The hearing will be structured for the receipt of oral or written comments by interested persons. Registration will begin 30 minutes prior to the hearing. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, commission staff members will be available to informally discuss the proposal 30 minutes before the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Kristin Smith, Office of Legal Services, at (512) 239-0177.

Comments may be submitted to Kristin Smith, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-046-290-PR. The comment period closes June 2, 2008. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Cindy Haynie, Public Drinking Water Section at (512) 239-3465.

TRD-200802021
Robert Martinez
Director, Environmental Law Division
Texas Commission on Environmental Quality
Filed: April 18, 2008

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Notice of Public Hearing on Proposed Revisions to 30 TAC Chapter 334

The Texas Commission on Environmental Quality (commission) will conduct a public hearing to receive testimony concerning proposed revisions to 30 TAC Chapter 334, Underground and Aboveground Storage Tanks, under the requirements of Texas Health and Safety Code, §382.017; and Texas Government Code, Chapter 2001, Subchapter B.

The proposed rulemaking would implement House Bill (HB) 3554 and HB 1956, 80th Legislature, 2007, Regular Session. At the request of the commission, the preamble of this rule proposal also specifically requests comments on the question of whether Leaking Petroleum Storage Tank (LPST) sites should be removed from the Texas Risk Reduction Program (TRRP) requirements in 30 TAC Chapter 350.

The commission will hold a public hearing on this proposal in Austin on May 27, 2008, 10:00 a.m. at the Texas Commission on Environmental Quality complex located at 12100 Park 35 Circle in Building E, Room 201S. The hearing will be structured for the receipt of oral or written comments by interested persons. Individuals may present oral statements when called upon in order of registration. There will be no open discussion during the hearing; however, an agency staff member will be available to discuss the proposal 30 minutes prior to the hearing.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact Michael Parrish, Office of Legal Services, at (512) 239-2548.

Comments may be submitted to Michael Parrish, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at *http://www5.tceq.state.tx.us/rules/ecomments*. File size restrictions may apply to comments submitted through the eComments system. All comments should reference Rule Project Number 2007-037-334-PR. The comment period closes June 2, 2008. Copies of the proposed rules can be obtained from the commission's Web site at *http://www.tceq.state.tx.us/nav/rules/propose_adopt.html*. For further information, please contact Anton Rozsypal, Remediation Division, (512) 239-5755.

TRD-200802064
Mary R. Risner
Director, Litigation Division
Texas Commission on Environmental Quality
Filed: April 18, 2008

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Notice of Water Quality Applications

The following notices were issued during the period of April 10, 2008 through April 18, 2008.

The following require the applicants to publish notice in a newspaper. Public comments, requests for public meetings, or requests for a contested case hearing may be submitted to the Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087, WITHIN 30 DAYS OF THE DATE OF NEWSPAPER PUBLICATION OF THE NOTICE.

INFORMATION SECTION

CITY OF GARLAND has applied to the Texas Commission on Environmental Quality (TCEQ) for a renewal of TPDES Permit No. WQ0010090002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 24,000,000 gallons per day. The facility is located at 2500 East Centerville Road, about 1/4 mile south of the intersection of State Highway 66, on the southeast corner where Missouri, Kansas and Texas Railroad tracks cross Centerville Road in Dallas County, Texas.

CITY OF LA FERIA has applied for a major amendment to TPDES Permit No. WQ0010697002 to authorize an additional outfall for the discharge of treated effluent not to exceed 800,000 gallons per day via pipeline to a series of wetlands; thence to a drainage ditch; thence to another drainage ditch; thence to the Arroyo Colorado Above Tidal in Segment No. 2202 of the Nueces-Rio Grande Coastal Basin. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,250,000 gallons per day. The facility will be located on South Rabb Road, approximately 0.6 miles south of U.S. Highway 83 Business in Cameron County, Texas.

CITY OF SHENANDOAH has applied for a renewal of TPDES Permit No. WQ0012212002, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,000,000 gallons per day. The facility is located approximately 800 feet east of Interstate Highway 45 and 4,000 feet north of Tamina Road in the City of Shenandoah in Montgomery County, Texas.

GUADALUPE BLANCO RIVER AUTHORITY has applied for a renewal of Permit No. WQ0004438000 to authorize the land application of wastewater treatment plant sewage sludge for beneficial use on 47.914 acres. The land application site is located one mile west of the City of Marion on Gerdes Road, approximately 0.8 mile north of the intersection of Gerdes Road and Santa Clara Road in Guadalupe County, Texas.

HARRIS COUNTY FRESH WATER SUPPLY DISTRICT NO 58 has applied for a renewal of TPDES Permit No. WQ0010668001 which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 550,000 gallons per day. The facility is located at 20410 Buffalo Trail in the Indian Shores Subdivision, approximately 4 miles south-southwest of the intersection of Farm-to-Market Road 1960 and Farm-to-Market Road 2100 in Harris County, Texas.

HARRIS COUNTY MUNICIPAL UTILITY DISTRICT NO 155 has applied for a major amendment to TPDES Permit No. WQ0012726001 to authorize an increase in the effluent limitations for Total Copper. A copper water effects ratio (WER) of 4.65 was deemed approvable by the Environmental Protection Agency (EPA) on January 14, 2008 and was used to reevaluate the need for copper limits. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 1,550,000 gallons per day. The facility is located on the southern bank of Horsepen Creek, approximately 8,500 feet north of Farm-to-Market Road 529 and 9,000 feet west of Farm-to-Market Road 1960 in Harris County, Texas.

K-3 RESOURCES LP has applied for a renewal of Texas Pollutant Discharge Elimination System (TPDES) Permit No. WQ0004538000 (EPA I.D. TXL005011) to authorize the processing of municipal wastewater treatment plant sludge by lime stabilization at a 0.4 acre facility. This permit will not authorize a discharge of pollutants into waters in the State. The facility is located inside the Karlis Ercums III Trust Property, which is located in northwest corner of the intersection of State Highway 362 and State Highway 529, in Waller County, Texas.

LAURA REDOW KARBALAI has applied for a renewal of TPDES Permit No. WQ0012761001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 0.05 million gallons per day. The facility is located approximately 0.25 mile southeast of the intersection of State Highway 105 and Old State Highway 105, approximately 0.25 mile west of the intersection of State Highway 105 and East Beach Road in Montgomery County, Texas.

LAURA REDOW KARBALAI has applied for a renewal of TPDES Permit No. WQ0014217001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 20,000 gallons per day. The facility is located approximately 900 feet north and 1,900 feet east of the intersection of Airline Drive and Carby Street in Harris County, Texas.

NORTH TEXAS MUNICIPAL WATER DISTRICT has applied for a renewal of TPDES Permit No. WQ0014469001, which authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 5,000,000 gallons per day. The facility is located at 2501 Crenshaw Road, which is at the southernmost corner of Crenshaw Road 1 1/4 miles southeast of the intersection of Crenshaw Road and Farm-to-Market Road 548, near the confluence of Parker Creek and Sabine Creek in Rockwall County, Texas.

RESCAR INDUSTRIES INC, which operates a railcar cleaning and repair facility, has applied for a renewal of TPDES Permit No. WQ0001922000, which authorizes the discharge of treated and untreated wastewater, and uncontaminated storm water at a daily maximum flow not to exceed 100,000 gallons per day via Outfall 001. The facility is located at 407 West Brentwood, southwest of the intersection of West Brentwood Drive and the Union-Pacific Railroad, approximately one (1) mile east of Beltway 8 in the City of Channelview, Harris County, Texas.

SHELDON ROAD MUNICIPAL UTILITY DISTRICT has applied for a renewal of TPDES Permit No. WQ0010541001, which authorizes the discharge of treated domestic wastewater at a daily average flow not to exceed 210,000 gallons per day. The facility is located approximately

1.25 miles south-southwest of the intersection of U.S. Highway 90 and Sheldon Road in Harris County.

THE CITY OF CARTHAGE has applied for a major amendment to TPDES Permit No. WQ0010074003 to authorize the disposal of treated sewage sludge on 41 acres of pastureland adjacent to the plant site. The current permit authorizes the discharge of treated domestic wastewater at an annual average flow not to exceed 3,600,000 gallons per day. The facility is located at 1133 Hills Lake Road, east of the City of Carthage and south of Hoggs Bayou, approximately 1.5 miles east of the intersection of U.S. Highways 59 and 79 in Panola County, Texas.

If you need more information about these permit applications or the permitting process, please call the TCEQ Office of Public Assistance, Toll Free, at 1-800-687-4040. General information about the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200802150
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 23, 2008

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Notice of Water Rights Application

Notice issued April 10, 2008.

APPLICATION NO. 02-4900A; Valley NG Power Company LLC, applicant, 1601 Bryan Street, Dallas, Texas, 75201-3411, has applied for an amendment to Certificate of Adjudication No. 02-4900 to divert and use an additional 6,400 acre-feet of water per year, released from Valley NG Power Company LLC's 16,400 acre-feet of storage in an existing reservoir (Lake Texoma), owned by the United States Army Corps of Engineers, on the Red River, Red River Basin, in Grayson County for industrial (cooling) purposes. More information on the application and how to participate in the permitting process is given below. Notice of this application was issued on August 2, 2007 to the water right holders of record in the Red River Basin, and the comment period ended on September 4, 2007. The applicant has since provided information on its name change from TXU Generation Company LP to Valley NG Power Company LLC and also deleted its request to increase the diversion rate from Lake Texoma. The application was received on August 17, 2006. Additional information and fees were received on November 8, 2006, May 8, June 14, July 24, October 11, December 4, and December 14, 2007. The application was declared administratively complete and accepted for filing with the Office of the Chief Clerk on December 28, 2006. Written public comments and requests for a public meeting should be received in the Office of Chief Clerk, at the address provided in the information section below, within 30 days of the date of newspaper publication of the notice.

INFORMATION SECTION

To view the complete issued notice, view the notice on our web site at www.tceq.state.tx.us/comm_exec/cc/pub_notice.html or call the Office of the Chief Clerk at (512) 239-3300 to obtain a copy of the complete notice. When searching the web site, type in the issued date range shown at the top of this document to obtain search results.

A public meeting is intended for the taking of public comment, and is not a contested case hearing.

The Executive Director can consider approval of an application unless a written request for a contested case hearing is filed. To request a contested case hearing, you must submit the following: (1) your name (or for a group or association, an official representative), mailing address, daytime phone number, and fax number, if any: (2) applicant's name and permit number; (3) the statement "I/we request a contested case hearing;" and (4) a brief and specific description of how you would be affected by the application in a way not common to the general public. You may also submit any proposed conditions to the requested application which would satisfy your concerns. Requests for a contested case hearing must be submitted in writing to the TCEQ Office of the Chief Clerk at the address provided in the information section below.

If a hearing request is filed, the Executive Director will not issue the requested permit and may forward the application and hearing request to the TCEQ Commissioners for their consideration at a scheduled Commission meeting.

Written hearing requests, public comments or requests for a public meeting should be submitted to the Office of the Chief Clerk, MC 105, TCEQ, P.O. Box 13087, Austin, TX 78711-3087. For information concerning the hearing process, please contact the Public Interest Counsel, MC 103, at the same address. For additional information, individual members of the general public may contact the Office of Public Assistance at 1-800-687-4040. General information regarding the TCEQ can be found at our web site at www.tceq.state.tx.us. Si desea información en Español, puede llamar al 1-800-687-4040.

TRD-200802151
LaDonna Castañuela
Chief Clerk
Texas Commission on Environmental Quality
Filed: April 23, 2008

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Texas Facilities Commission

Request for Offers #303-8-11539

The Texas Facilities Commission (TFC), on behalf of the Texas Department of Public Safety (DPS), announces the issuance of a Request for Offers (RFO) #303-8-11539 to solicit Offers to sell qualified parcels of land to DPS, located in an area within the City of El Paso, El Paso County, Texas. The site should contain a minimum of 2 acres of land or 87,120 square feet of contiguous land, which is the preferred size. However, sites greater than 2 acres will be considered.

The deadline for questions is May 6, 2008 and the deadline for offers is May 12, 2008 at 3:00 p.m. The award date is to be determined. TFC reserves the right to accept or reject any or all offers submitted. TFC is under no legal or other obligation to issue an award on the basis of this notice or the distribution of a RFO. Neither this notice nor the RFO commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting an offer may obtain information by contacting Richard Ehlert at (512) 463-0209 or Richard.Ehlert@tfc.state.tx.us. A copy of the RFO may be downloaded from the Electronic State Business Daily at: *http://esbd.cpa.state.tx.us/bid_show.cfm?bidid=76235.*

TRD-200802157
Kay Molina
General Counsel
Texas Facilities Commission
Filed: April 23, 2008

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Request for Proposals #303-8-10871

The Texas Facilities Commission (TFC), on behalf of the Health and Human Services Commission (HHSC), announces the issuance of Re-

quest for Proposals (RFP) #303-8-10871. TFC seeks a five (5) or ten (10) year lease of approximately 3,953 square feet of office space in Levelland, Hockley County, Texas.

The deadline for questions is May 9, 2008 and the deadline for proposals is May 16, 2008 at 3:00 p.m. The award date is June 18, 2008. TFC reserves the right to accept or reject any or all proposals submitted. TFC is under no legal or other obligation to execute a lease on the basis of this notice or the distribution of a RFP. Neither this notice nor the RFP commits TFC to pay for any costs incurred prior to the award of a grant.

Parties interested in submitting a proposal may obtain information by contacting TFC Purchaser Sandy Williams at (512) 475-0453. A copy of the RFP may be downloaded from the Electronic State Business Daily at: *http://esbd.cpa.state.tx.us/1380/bid_show.cfm?bidid=76182*.

TRD-200802069
Kay Molina
General Counsel
Texas Facilities Commission
Filed: April 21, 2008

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Texas Health and Human Services Commission

Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 19, 2008, at 9:00 a.m. to receive public comment on the proposed interim per diem Medicaid reimbursement rate for small, state-operated Intermediate Care Facilities for Persons with Mental Retardation (ICF/MR) operated by the Texas Department of Aging and Disability Services (DADS).

The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code Title 1, §355.105(g), which requires public notice and hearings on proposed Medicaid reimbursements before such rates are approved by HHSC. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring Americans with Disability Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. As the single state agency for the state Medicaid program, HHSC proposes the following interim daily reimbursement rate for small, state-operated ICF/MR facilities operated by DADS: $340.99.

HHSC is proposing these interim rates so that adequate funds will be available to serve clients in these facilities. The proposed interim rate accounts for actual and projected increases in costs to operate these facilities and a change in the provider base due to the closure or conversion of a large number of facilities. The proposed interim rates will be effective September 1, 2007, if approved.

Methodology and Justification. The proposed rates were determined in accordance with the rate setting methodologies codified at Texas Administrative Code Title 1, Chapter 355, Subchapter D, §355.456(e), relating to Reimbursement Determination for State-Operated Facilities.

Briefing Package. A briefing package describing the proposed payment rates will be available on May 5, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200802052
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 18, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on May 20, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rate for Case Management for the Blind and Visually Impaired Children's Program (BVICP). This program is operated by the Texas Department of Assistive and Rehabilitative Services (DARS). The public hearing will be held in the Permian Basin Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. The hearing will be held in compliance with 1 TAC §355.105(g), which requires public hearings on proposed Medicaid reimbursements. Persons requiring ADA accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174 at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. The proposed payment rate calculation is based on audited financial and statistical data reported by DARS BVICP for its 2007 fiscal year. The payment rate is proposed to be effective June 1, 2008.

Methodology and Justification. The proposed payment rate was developed pursuant to the reimbursement methodology rules, 1 TAC §355.8381, relating to Reimbursement Rates for Case Management.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after May 2, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at kimbra.rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of or in addition to oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to kimbra.rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200802073

Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 21, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on May 19, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rate for procedure code K0730 associated with the Respiratory Equipment and Supplies - Home Health policy. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed effective date for the Medicaid fee for durable medical equipment (DME) procedure code K0730, a controlled dose inhalation drug delivery system, is June 1, 2008, along with the associated medical policy changes.

Methodology and Justification. The proposed payment rate is calculated in accordance with 1 TAC §355.8021(c), which addresses the Reimbursement Methodology for Home Health Services and 1 TAC §355.8441(3), relating to the Reimbursement Methodologies for Early and Periodic, Screening, Diagnosis, and Treatment (EPSDT) Services.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after May 5, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1174 by May 14, 2008, so appropriate arrangements can be made.

TRD-200802117
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 22, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on May 19, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rate for procedure code J1830 associated with the Medicaid Injections - Interferon (Pentostatin) policy. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed effective date for the Medicaid fee for the physician-administered drug procedure code J1830 is June 1, 2008, along with the associated medical policy changes.

Methodology and Justification. The proposed payment rate is calculated in accordance with 1 TAC §355.8085, relating to the Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners; and the specific fee guidelines published in Section 2.2.1.2 of the 2008 Texas Medicaid Provider Procedures Manual.

Briefing Package. A briefing package describing the proposed payment rate will be available on or after May 5, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rate may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1174 by May 14, 2008, so appropriate arrangements can be made.

TRD-200802118
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 22, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on May 19, 2008 at 1:30 p.m. to receive public comment on proposed Medicaid rates for 23 procedure codes associated with 2008 Healthcare Common Procedure Code System (HCPCS) updates. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed payment rates for twenty-two procedure codes associated with the 2008 HCPCS annual update include 14

physician-administered drugs procedure codes, three expendable medical supplies procedure codes, and five durable medical equipment (DME) procedure codes and are proposed to be effective retroactively to January 1, 2008. The proposed payment rate for one procedure code associated with the first quarter 2008 HCPCS update includes one DME procedure code and is proposed to be effective retroactively to April 1, 2008.

Methodology and Justification. The proposed payment rates for the physician-administered drugs procedure codes are calculated in accordance with 1 TAC §355.8085, relating to the Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners and the specific fee guidelines published in Section 2.2.1.2 of the 2008 Texas Medicaid Provider Procedures Manual. The proposed payment rates for the expendable medical supplies procedure codes are calculated in accordance with 1 TAC §355.8021(b), relating to the Reimbursement Methodology for Home Health Services, and 1 TAC §355.8441(2), relating to the Reimbursement Methodologies for Early and Periodic, Screening, Diagnosis, and Treatment (EPSDT) Services. The proposed payment rates for the DME procedure codes are calculated in accordance with 1 TAC §355.8021(c), which addresses the reimbursement methodology for DME as a home health service and 1 TAC §355.8441(3), relating to the reimbursement methodology for DME under the Early and Periodic, Screening, Diagnosis, and Treatment (EPSDT) Program, which is known as the Texas Health Steps Program or THSteps.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after May 5, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1175; by fax at (512) 491-1998; or by e-mail at Kimbra.rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1358 by May 14, 2008, so appropriate arrangements can be made.

TRD-200802120
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 22, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission will conduct a public hearing on May 19, 2008 at 1:30 p.m. to receive public comment on proposed Medicaid rates for eight laboratory procedure codes associated with 2008 Healthcare Common Procedure Coding System (HCPCS) first quarter updates. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Blvd, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and Texas Administrative Code (TAC) Title 1, §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. These procedure codes were added as new benefits under the Texas Medicaid Program in the May/June 2008 Texas Medicaid Bulletin, No. 215. The proposed payment rates for the new eight laboratory procedure codes associated with the 2008 HCPCS first quarter update include seven clinical laboratory procedure codes and one laboratory procedure and are proposed to be effective retroactively to April 1, 2008.

Methodology and justification. The proposed payment rates for the clinical laboratory procedure codes are calculated in accordance with 1 TAC §355.8610, relating to Reimbursement for Clinical Laboratory Services. The proposed payment for the one laboratory procedure code is calculated in accordance with 1 TAC §355.8081, which includes the reimbursement methodology for laboratory services.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after May 5, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1175; by fax at (512) 491-1998; or by e-mail at Kimbra.rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at 512-491-1358 by May 14, 2008, so appropriate arrangements can be made.

TRD-200802143
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 23, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 19, 2008 at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for procedure codes 95250 and 95251 associated with the Continuous Glucose Monitoring Systems policy. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. These two procedure codes are being added as benefits under the Texas Medicaid Program effective June 1, 2008.

Methodology and Justification. The proposed payment rates for physician services procedure codes 95250 and 95251 are calculated in accordance with 1 TAC §355.8085, relating to the Texas Medicaid Reimbursement Methodology (TMRM) for Physicians and Certain Other Practitioners.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after May 5, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1174; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1358 by May 14, 2008, so appropriate arrangements can be made.

TRD-200802153
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 23, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 19, 2008 at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for proton therapy procedure codes 77520, 77522, 77523, and 77525. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed updated rates for the four proton therapy procedure codes are the result of a fee review, are calculated in accordance with 1 TAC §355.8081, and are proposed to be effective June 1, 2008.

Methodology and Justification. The proposed payment rates for the four proton therapy procedure codes are considered radiation therapy and are calculated in accordance with 1 TAC §355.8081, which includes the reimbursement methodology for radiation therapy services.

Briefing Package. A briefing package describing the proposed payment rates will be available on or after May 5, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1174; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1358 by May 14, 2008, so appropriate arrangements can be made.

TRD-200802154
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 23, 2008

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Notice of Public Hearing on Proposed Medicaid Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 19, 2008, at 1:30 p.m. to receive public comment on the proposed Medicaid payment rates for enteral formulae, enteral medical supplies, parenteral nutrition solutions, and parenteral supplies. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. The hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.201(e) - (f), which require public notice and hearings on proposed Medicaid reimbursements.

Proposal. The proposed updated rates are the result of a Medicaid fee review and are proposed to be effective June 1, 2008.

Methodology and Justification. The proposed payment rates for enteral formulae, enteral medical supplies, parenteral nutrition solutions, and parenteral supplies are considered expendable medical supplies and are calculated in accordance with 1 TAC §355.8021(b), which addresses the Reimbursement Methodology for Expendable Medical Supplies as a Home Health Service, and 1 TAC §355.8441(2), relating to the Reimbursement Methodologies for Early and Periodic, Screening, Diagnosis, and Treatment (EPSDT) Services (known in Texas as THSteps).

Briefing Package. A briefing package describing the proposed payment rates will be available on or after May 5, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra. Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1174; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400,

Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

People with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Kimbra Rawlings at (512) 491-1358 by May 14, 2008, so appropriate arrangements can be made.

TRD-200802155
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 23, 2008

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Notice of Hearing on Proposed Provider Payment Rates

Hearing. The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on May 23, 2008, at 9:00 a.m. to receive public comment on proposed payment rates for Overnight Companion Services in the Community Based Alternatives (CBA) Program waiver. The Department of Aging and Disability Services (DADS) operates this waiver program.

The public hearing will be held in compliance with Human Resources Code §32.0282 and 1 Texas Administrative Code (TAC) §355.105(g), which require public notice, and that public hearings be held on proposed reimbursement rates before such rates are approved by HHSC. The public hearing will be held in the Lone Star Conference Room of the Health and Human Services Commission, Braker Center, Building H, located at 11209 Metric Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Metric Boulevard. Persons requiring American with Disabilities Act (ADA) accommodation or auxiliary aids or services should contact Kimbra Rawlings by calling (512) 491-1174, at least 72 hours prior to the hearing so appropriate arrangements can be made.

Proposal. HHSC proposes to adopt a rate for the service listed above. The proposed rate will be effective June 1, 2008, and was determined in accordance with the rate setting methodologies listed below under Methodology and Justification.

Methodology and Justification. The proposed rate was determined in accordance with the rate setting methodologies codified at 1 TAC Chapter 355, Subchapter A, §355.101, Introduction, and Subchapter E, §355.503(c), Reimbursement Methodology for the Community-Based Alternatives Waiver Program and the Integrated Care Management-Home and Community Support Services and Assisted Living/Residential Care Programs. Overnight Companion Services is a new service that will be available to CBA consumers as soon as the proposed rate is approved and effective. Overnight Companion Services is a demonstration service available only to eligible CBA Money Follows the Person (MFP) Demonstration participants residing in Cameron, Hidalgo and Willacy counties.

Briefing Package. A briefing package describing the proposed payment rates will be available on May 9, 2008. Interested parties may obtain a copy of the briefing package prior to the hearing by contacting Kimbra Rawlings by telephone at (512) 491-1174; by fax at (512) 491-1998; or by e-mail at Kimbra.Rawlings@hhsc.state.tx.us. The briefing package also will be available at the public hearing.

Written Comments. Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the attention of Kimbra Rawlings, Health and Human Services Commission, Rate Analysis, Mail Code H-400, P.O. Box 85200, Austin, Texas 78708-5200; by fax to Kimbra Rawlings at (512) 491-1998; or by e-mail to Kimbra.Rawlings@hhsc.state.tx.us. In addition, written comments may be sent by overnight mail or hand delivered to Kimbra Rawlings, HHSC, Rate Analysis, Mail Code H-400, Braker Center, Building H, 11209 Metric Boulevard, Austin, Texas 78758-4021.

TRD-200802158
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 23, 2008

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Public Notice

The Texas Health and Human Services Commission (HHSC) announces its intent to submit a new 1915(c) Medicaid waiver. The proposed waiver program is intended to provide community-based services to children with severe emotional disturbances and their families, with a goal of reducing or preventing children's inpatient psychiatric treatment and their consequent removal from their families. The waiver program is estimated to serve up to 300 youth at any given time who are under age 19 and who are predicted to remain in the waiver program for 12 months.

The 78th and 79th Texas Legislatures directed HHSC through General Appropriations Act riders 11 and 8, respectively, to use appropriated money to develop and implement a plan to prevent custody relinquishment of youth with serious emotional disturbance. While Texas currently has other 1915(c) waivers that serve children with physical or developmental disabilities, HHSC and the Department of State Health Services (DSHS) chose to submit a new 1915(c) waiver because the current waivers do not serve children with severe emotional disturbance who do not also have other disabilities. This proposed waiver will help address this gap. The waiver would initially be piloted in a limited geographic area, with the opportunity to expand to other areas if the waiver is successful.

HHSC plans to request that the waiver be effective September 1, 2009. The proposed waiver meets federal cost neutrality requirements and can be implemented within the current state Medicaid budget. For cost neutrality purposes for the federal formula projections, the waiver is estimated to result in cost savings of approximately $38.5 million for the waiver period of September 1, 2009, through July 31, 2011, with savings of approximately $23.4 million in federal funds and $15.1 million in state general revenue. Experience is needed to demonstrate the actual cost impact.

To obtain copies of the proposed waiver, interested parties may contact Betsy Johnson, Texas Health and Human Services Commission, P.O. Box 85200, mail code H-620, Austin, Texas 78708-5200, phone (512) 491-1199, fax (512) 491-1953, e-mail Betsy.johnson@hhsc.state.tx.us.

TRD-200802128
Steve Aragón
Chief Counsel
Texas Health and Human Services Commission
Filed: April 22, 2008

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Department of State Health Services

Licensing Actions for Radioactive Materials

The Department of State Health Services has taken actions regarding Licenses for the possession and use of radioactive materials as listed in the tables. The subheading "Location" indicates the city in which the radioactive material may be possessed and/or used. The location listing "Throughout Texas" indicates that the radioactive material may be used on a temporary basis at job sites throughout the state.

NEW LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
El Paso	TDI Brooks International Inc.	L06139	El Paso	00	04/02/08
El Paso	Tenet Hospitals Limited DBA Sierra Providence East Medical Center	L06152	El Paso	00	04/04/08
El Paso	Ajai J. Agarwal MD PA DBA Montwood Medical Center	L06144	El Paso	00	04/14/08
Houston	Hotwell US LTD	L06145	Houston	00	04/08/08
Throughout TX	PSC Industrial Outsourcing LP	L06155	Deer Park	00	04/01/08

AMENDMENTS TO EXISTING LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Abilene	Hendrick Medical Center	L02433	Abilene	96	04/01/08
Abilene	Abilene Cardiology Consultants PA	L04315	Abilene	31	04/03/08
Addison	Rockwall Regional Hospital LLC DBA Presbyterian Hospital of Rockwall	L06103	Addison	01	04/01/08
Amarillo	Cardiology Center of Amarillo LLP	L05736	Amarillo	08	04/01/08
Amarillo	Amarillo Heart Group LLP DBA Amarillo Heart Group	L04697	Amarillo	24	03/31/08
Angleton	Isotherapeutics Group LLC	L05969	Angleton	05	04/14/08
Arlington	Texas Oncology PA DBA Texas Cancer Center Arlington	L05116	Arlington	19	04/02/08
Austin	Daughters of Charity Health Services of Austin DBA Dell Childrens Medical Center of Central Texas	L06065	Austin	06	04/11/08
Austin	Daughters of Charity Health Services of Austin DBA Brackenridge Hospital	L00268	Austin	98	04/11/08
Austin	Austin Radiological Association	L00545	Austin	141	04/01/08
Austin	Austin Heart PA	L04623	Austin	56	04/01/08
Austin	Austin Texas Radiation Oncology Group PA DBA Austin Cancer Centers	L01761	Austin	56	04/08/08
Beaumont	Diagnostic Health Centers of Texas LP DBA Diagnostic Health Beaumont	L03888	Beaumont	38	03/31/08
Bedford	Texas Oncology PA DBA Edwards Cancer Center	L05550	Bedford	16	04/08/08
Dallas	University of Texas Southwestern Medical Center of Dallas	L05947	Dallas	12	04/15/08
Dallas	Endocrine Associates of Dallas PA	L02668	Dallas	21	04/01/08
Dallas	Presbyterian Hospital of Dallas	L01586	Dallas	92	04/02/08
Dallas	Tenet Hospitals Limited a Texas Limited Partnership DBA Doctors Hospital at White Rock Lake	L01366	Dallas	50	04/10/08
Dallas	Cardinal Health	L05610	Dallas	11	04/07/08
Dallas	Tenet Hospitals Limited A Texas Limited Partnership DBA Doctors Hospital of Dallas	L01366	Dallas	49	04/07/08
Dallas	Cumbre Inc.	L05474	Dallas	06	04/04/08
Deer Park	Equistar Chemicals LP	L00204	Deer Park	64	04/04/08
El Paso	Guillermo A. Pinzon MD PA	L04277	El Paso	14	04/01/08
El Paso	Texas Oncology PA DBA El Paso Cancer Treatment Center	L05771	El Paso	08	04/11/08
El Paso	East El Paso Physicians Medical Center LLC	L05676	El Paso	07	04/08/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
El Paso	Cardinal Health	L01999	El Paso	111	04/04/08
Fannin	Coleto Creek Power LP DBA Coleto Creek Power Station	L02519	Fannin	20	04/02/08
Fort Worth	Fort Worth Heart PA	L05480	Fort Worth	24	04/14/08
Fort Worth	John Peter Smith Hospital	L02208	Fort Worth	65	03/31/08
Fort Worth	University of North Texas Health Science Ctr DBA UNT Health	L06123	Fort Worth	01	04/08/08
Harlingen	Texas Coast Cardiovascular LLC DBA Lisa Dix-Emperador MD PA	L05983	Harlingen	01	04/01/08
Houston	Go Imaging LLP	L06117	Houston	01	04/15/08
Houston	Cardiac Nuclear Imaging Inc.	L05962	Houston	03	04/11/08
Houston	New Medical Horizons II LTD DBA Cypress Fairbanks Medical Center	L03424	Houston	32	04/10/08
Houston	Columbia/HCA Healthcare Corp DBA Spring Branch Medical Center	L02473	Houston	65	04/03/08
Houston	Harris County Hospital District DBA LBJ General Hospital	L04412	Houston	35	04/04/08
Houston	Houston Northwest Radiotherapy Center	L02416	Houston	36	04/07/08
Houston	Baylor College of Medicine Office of Environmental Safety	L00680	Houston	98	04/02/08
Houston	Cardinal Health	L05536	Houston	22	04/09/08
Houston	S.J. Medical Center LLC DBA St. Joseph Medical Center	L02279	Houston	67	04/11/08
Houston	The Methodist Hospital	L00457	Houston	158	04/07/08
Houston	Memorial MRI and Diagnostic LLC DBA Memorial Nuclear Imaging LP	L05997	Houston	05	04/08/08
Humble	Cardiovascular Association PLLC	L05421	Humble	09	04/01/08
Humble	Memorial Hermann Hospital Systems DBA Memorial Hermann Northeast	L02412	Humble	69	04/04/08
Huntsville	Sam Houston Cancer Center	L06113	Huntsville	01	04/02/08
Irving	Baylor Medical Center at Irving DBA Irving Healthcare System	L02444	Irving	72	04/02/08
Jourdanton	Jourdanton Hospital Corporation DBA South Texas Regional Medical Center	L04966	Jourdanton	14	04/04/08
La Porte	E I DuPont De Nemours & Company	L00314	La Porte	85	04/14/08
Lubbock	Covenant Health System DBA Covenant Medical Center-Lakeside	L01547	Lubbock	89	04/14/08
Lubbock	Covenant Medical Center	L00483	Lubbock	138	04/09/08
Lubbock	Grace Clinic of Lubbock DBA Grace Clinic	L06040	Lubbock	03	04/03/08
McAllen	Harish Koolwal MD PA Valley Heart Center	L05149	McAllen	11	04/01/08
Midland	Texas Oncology PA DBA Allison Cancer Center	L04905	Midland	12	03/31/08
Odessa	West Texas Imaging Center	L04562	Odessa	10	04/01/08
Odessa	Ector County Hospital District DBA Medical Center Hospital	L01223	Odessa	87	04/09/08
Pampa	Titan Specialties LTD	L04920	Pampa	11	04/10/08
Paris	Physician Reliance Network Inc. DBA Paris Regional Cancer Center	L04664	Paris	16	04/04/08
Pasadena	Pasadena Refining System Inc.	L01344	Pasadena	30	04/11/08
Pasadena	David S. Hamer MD PA DBA Southeast Houston	L05364	Pasadena	06	04/01/08
Plano	Medical Edge Healthcare Group PA DBA Heart First	L05555	Plano	21	04/10/08
Richmond	Oakbend Medical Center	L02406	Richmond	48	04/14/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Round Rock	Daughters of Charity Health Services of Austin DBA Seton Medical Center Williamson	L06128	Round Rock	01	04/11/08
San Angelo	American Diagnostic Medicine Inc.	L06068	San Angelo	03	04/01/08
San Antonio	Methodist Healthcare System of San Antonio DBA Methodist Hospital	L00594	San Antonio	241	04/09/08
San Antonio	Southwest General Hospital LLP DBA Southwest General Hospital	L02689	San Antonio	37	04/07/08
Sugar Land	Kota J. Reddy MD PA	L05568	Sugar Land	05	04/10/08
Temple	Scott and White Memorial Hospital and Scott Sherwood and Brindley Foundation DBA Scott and White Memorial Hospital	L00331	Temple	82	04/07/08
The Woodlands	St.Lukes Community Medical Center the Woodlands	L05763	The Woodlands	10	04/09/08
Throughout TX	Desert Industrial X-Ray LP	L04590	Abilene	79	04/01/08
Throughout TX	Team Industrial Services Inc.	L00087	Alvin	182	04/02/08
Throughout TX	Qal-Tek Associates LLC	L05965	Austin	03	04/01/08
Throughout TX	Kleinfelder	L01351	Austin	58	04/01/08
Throughout TX	Alpha Testing Inc.	L03411	Dallas	18	04/01/08
Throughout TX	Texas CMT Inc.	L04766	Dallas	11	04/01/08
Throughout TX	IRISNDT Inc.	L04769	Deer Park	51	04/10/08
Throughout TX	Pavetex Engineering and Testing Inc.	L05533	Dripping Springs	06	04/09/08
Throughout TX	Recon Petrotechnologies Inc.	L06026	Fort Worth	05	04/09/08
Throughout TX	L-3 Communications Corporation	L02155	Garland	33	04/09/08
Throughout TX	Numed Imaging Centers Inc.	L05016	Grapevine	18	04/14/08
Throughout TX	Weldsonix Inc.	L05718	Houston	36	04/04/08
Throughout TX	METCO	L03018	Houston	184	04/09/08
Throughout TX	Petrochem Inspection Services Inc.	L04460	Houston	85	04/04/08
Throughout TX	ERM Remediation & Construction Management-Southwest LLC	L05877	Houston	05	04/03/08
Throughout TX	USA Environment LP	L05616	Houston	03	04/03/08
Throughout TX	The University of Texas Health Science Center at Houston	L02774	Houston	55	04/02/08
Throughout TX	METCO	L03018	Houston	183	04/01/08
Throughout TX	H & G Inspection Company Inc. DBA Statewide Maintenance Company	L02181	Houston	223	04/02/08
Throughout TX	Material Inspection Technology Inc.	L05672	Houston	26	04/01/08
Throughout TX	RJR Engineering LTD LLP	L05416	Houston	04	04/02/08
Throughout TX	Oceaneering International Inc.	L04463	Ingleside	56	04/08/08
Throughout TX	Sam Engineering & Testing LP	L04930	Irving	09	04/14/08
Throughout TX	Acuren Inspection Inc.	L01774	La Porte	243	04/04/08
Throughout TX	Southern Services Inc DBA Southern Technical Services DBA BIX Testing Laboratories	L05270	Lake Jackson	50	04/01/08
Throughout TX	Hi-Tech Testing Service Inc.	L05021	Longview	70	04/09/08
Throughout TX	Eagle X-Ray	L03246	Mont Belvieu	97	04/08/08
Throughout TX	Big State X-Ray	L02693	Odessa	67	04/01/08
Throughout TX	Link Field Services Inc.	L05383	Olden	23	04/09/08
Throughout TX	T C Inspection Inc.	L05833	Oyster Creek	30	04/14/08
Throughout TX	Texas Gamma Ray LLC	L05561	Pasadena	83	04/02/08
Throughout TX	Conam Inspection & Engineering Inc.	L05010	Pasadena	141	04/02/08
Throughout TX	Martin Marietta Materials Southwest LTD	L04768	San Antonio	08	03/14/08
Throughout TX	Schlumberger Technology Corporation	L00764	Sugar Land	107	04/14/08
Throughout TX	Blazer Inspection Inc.	L04619	Texas City	52	04/02/08
Throughout TX	Kleinfelder	L01351	Waco	59	04/10/08
Tyler	Physician Reliance Network Inc. DBA Tyler Cancer Center	L04788	Tyler	12	04/07/08

AMENDMENTS TO EXISTING LICENSES ISSUED CONTINUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Waco	Baylor University	L00343	Waco	25	04/01/08
Weatherford	Weatherford Texas Hospital Company LLC DBA Weatherford Regional Medical Center	L02973	Weatherford	19	04/15/08
Weslaco	South Texas Imaging Center-K PA DBA Stic-K	L05636	Weslaco	06	04/11/08

RENEWAL OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Amarillo	RCOA Imaging Services Inc.	L05329	Amarillo	14	04/14/08
Decatur	Wise Regional Health System	L02382	Decatur	33	04/15/08
Pasadena	Basell USA Inc.	L01854	Pasadena	36	03/31/08
San Antonio	Cardinal Health	L02033	San Antonio	101	04/14/08

TERMINATIONS OF LICENSES ISSUED:

Location	Name	License #	City	Amend-ment #	Date of Action
Fort Worth	Consultants in Radiology PA	L05014	Fort Worth	23	04/14/08
Nacogdoches	The Heart Doctor Imaging Center	L05894	Nacogdoches	05	04/04/08
Throughout TX	Mid-Tex Engineering & Testing LLC	L05175	Abilene	04	04/09/08
Throughout TX	CB&I Constructors Inc.	L01902	The Woodlands	70	04/15/08

In issuing new licenses, amending and renewing existing licenses, or approving license exemptions, the Department of State Health Services (department), Radiation Safety Licensing Branch, has determined that the applicant has complied with the applicable provisions of Title 25 Texas Administrative Code (TAC) Chapter 289 regarding radiation control. In granting termination of licenses, the department has determined that the licensee has complied with the applicable decommissioning requirements of 25 TAC Chapter 289. In denying the application for a license, license renewal or license amendment, the department has determined that the applicant has not met the applicable requirements of 25 TAC Chapter 289.

This notice affords the opportunity for a hearing on written request of a person affected within 30 days of the date of publication of this notice. A person affected is defined as a person who demonstrates that the person has suffered or will suffer actual injury or economic damage and, if the person is not a local government, is (a) a resident of a county, or a county adjacent to the county, in which radioactive material is or will be located, or (b) doing business or has a legal interest in land in the county or adjacent county. A person affected may request a hearing by writing Richard A. Ratliff, Radiation Program Officer, Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3189. For information call (512) 834-6688.

TRD-200802010
Lisa Hernandez
General Counsel
Department of State Health Services
Filed: April 17, 2008

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Texas Higher Education Coordinating Board

Request for Proposals: College Readiness Test Alignment Project - Phase 1

PURPOSE: The Texas Higher Education Coordinating Board (hereinafter referred to as THECB or Coordinating Board), an agency of the State of Texas, is requesting proposals from qualified applicants as outlined in this documents. This Request for Proposals (hereinafter referred to as RFP) is being advertised pursuant to the Texas Government Code Chapter 2254 et seq. Please read this entire RFP and submit your proposal in accordance with these instructions.

The Third Special Called Session of the 79th Texas Legislature added §28.008 to the Texas Education Code (TEC), entitled "Advancement of College Readiness in Curriculum," requiring the development of College Readiness Standards (CRS) by teams of higher education and public education faculty. The THECB and Commissioner of Education approved the CRS in January 2008. Under Objective 2 of the P-16 College Readiness and Success Strategic Action Plan adopted by the THECB, the state P-16 Council, and the Commissioner of Education pursuant to TEC §51.3061, the THECB and the Texas Education Agency (TEA) are to "align exit-level assessments of public education with entry-level expectations of higher education and the skilled workforce." To address Objective 2, the current assessments for determining college readiness under the Texas Success Initiative (TSI) as outlined under TEC §51.3062 must be analyzed and aligned to ensure accurate

measurement of a student's ability to successfully complete entry level college coursework.

AWARD OF CONTRACT: Contract will be negotiated with an entity that is selected from among the Applicants that are determined through the evaluation process to have a successful Proposal. Submission of a Proposal confers no rights of Applicant to an award or to a subsequent Contract, if there is one. The issuance of this RFP does not guarantee that a Contract will ever be awarded. THECB reserves the right to amend the terms and provisions of the RFP, negotiate with Applicant, add, delete, or modify the Contract and/or the terms of Proposal submitted, extend the deadline for submission of Proposal, or withdraw the RFP entirely for any reason solely at THECB's discretion. An individual Proposal may be rejected if it fails to meet any requirement of this RFP. THECB may seek clarification from Applicant at any time, and failure to respond within a reasonable time frame is cause for rejection of a Proposal.

INQUIRIES: All inquiries shall be directed to Laurie Frederick, Program Specialist, at Laurie.Frederick@thecb.state.tx.us. Applicant must not discuss a Proposal(s) with any other THECB employee unless authorized by one of the Points of Contact. Questions must be submitted in writing and received no later than May 9, 2008 at 5:00 p.m. CST. All responses by THECB must be in writing in order to be binding. Any information deemed by THECB to be important and of general interest or which modify requirements shall be sent to all recipients of the RFP in the form of an addendum.

CLOSING DATE: May 16, 2008

TRD-200802137
Bill Franz
General Counsel
Texas Higher Education Coordinating Board
Filed: April 23, 2008

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Texas Department of Insurance

Correction of Error

The Texas Department of Insurance proposed the repeal of 28 TAC §§7.8, 7.15, 7.27, 7.71, 7.613, 7.1012, and 7.1701 - 7.1711, concerning corporate and financial regulation. The notice appeared in the April 18, 2008, issue of the *Texas Register* (33 TexReg 3158).

An error appears in the rule preamble on page 3159. Under the heading "REQUEST FOR PUBLIC COMMENT", the deadline for submitting comments is stated to be April 18, 2008. The correct deadline date is May 18, 2008. The sentence should read as follows:

"To be considered, written comments on the proposal must be submitted no later than 5:00 p.m. on May 19, 2008 to Gene C. Jarmon, General Counsel and Chief Clerk, Mail Code 113 - 2A, Texas Department of Insurance, P.O. Box 149104, Austin, Texas 78714-9104."

TRD-200802148

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Third Party Administrator Applications

The following third party administrator (TPA) applications have been filed with the Texas Department of Insurance and are under consideration.

Application of CHAPPELLE CONSULTING GROUP, INC., a foreign third party administrator. The home office is BIRMINGHAM, ALABAMA.

Application of CULTURAL INSURANCE SERVICES INTERNATIONAL, INC., a foreign third party administrator. The home office is WILMINGTON, DELAWARE.

Application to change the name of PROFESSIONAL CLAIM SERVICES, INC. (using the assumed name of WELLPOINT PHARMACY MANAGEMENT) to NEXTRX SERVICES, INC., a foreign third party administrator. The home office is BUFFALO, NEW YORK.

Any objections must be filed within 20 days after this notice is published in the *Texas Register,* addressed to the attention of David Moskowitz, MC 305-2E, 333 Guadalupe, Austin, Texas 78701.

TRD-200802156
Gene C. Jarmon
Chief Clerk and General Counsel
Texas Department of Insurance
Filed: April 23, 2008

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Texas Lottery Commission

Instant Game Number 1092 "Red Hot 5's"

1.0 Name and Style of Game.

A. The name of Instant Game No. 1092 is "RED HOT 5'S". The play style for Game 1 is "key number match". The play style for Game 2 is "three in a line". The play style for Game 3 is "key symbol match". The play style for Game 4 is "key number match with auto win".

1.1 Price of Instant Ticket.

A. Tickets for Instant Game No. 1092 shall be $5.00 per ticket.

1.2 Definitions in Instant Game No. 1092.

A. Display Printing - That area of the instant game ticket outside of the area where the Overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the ticket.

C. Play Symbol - The printed data under the latex on the front of the instant ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black play symbols are: $5.00, $10.00, $15.00, $20.00, $25.00, $50.00, $100, $500, $1,000, $50,000, BELL SYMBOL, DIAMOND SYMBOL, GOLD BAR SYMBOL, MONEY BAG SYMBOL, COIN SYMBOL, HORSESHOE SYMBOL, MONEY SYMBOL, TOP HAT SYMBOL, 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 and 5X SYMBOL.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 1092 - 1.2D

PLAY SYMBOL	CAPTION
$5.00	FIVE$
$10.00	TEN$
$15.00	FIFTN
$20.00	TWENTY
$25.00	TWY FIV
$50.00	FIFTY
$100	ONE HUND
$500	FIV HUND
$1,000	ONE THOU
$50,000	50 THOU
BELL SYMBOL	BELL
DIAMOND SYMBOL	DMND
GOLD BAR SYMBOL	BAR
MONEY BAG SYMBOL	BAG
COIN SYMBOL	COIN
HORSESHOE SYMBOL	SHOE
MONEY SYMBOL	MONEY
TOP HAT SYMBOL	TPHAT
1	ONE
2	TWO
3	THR
4	FOR
6	SIX
7	SVN
8	EGT
9	NIN
10	TEN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
20	TWY
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI

30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI
40	FRTY
5X SYMBOL	WINX5

E. Serial Number - A unique 14 (fourteen) digit number appearing under the latex scratch-off covering on the front of the ticket. There will be a four (4)-digit "security number" which will be individually boxed and randomly placed within the number. The remaining ten (10) digits of the Serial Number are the Validation Number. The Serial Number is positioned beneath the bottom row of play data in the scratched-off play area. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 00000000000000.

F. Low-Tier Prize - A prize of $5.00, $10.00, $15.00 or $20.00.

G. Mid-Tier Prize - A prize of $50.00, $100 or $500.

H. High-Tier Prize - A prize of $1,000, $5,000 or $50,000.

I. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) bar code which will include a four (4) digit game ID, the seven (7) digit pack number, the three (3) digit ticket number and the ten (10) digit Validation Number. The bar code appears on the back of the ticket.

J. Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (1092), a seven (7) digit pack number, and a three (3) digit ticket number. Ticket numbers start with 001 and end with 075 within each pack. The format will be: 1092-0000001-001.

K. Pack - A pack of "RED HOT 5'S" Instant Game tickets contains 075 tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The packs will alternate. One will show the front of ticket 001 and back of 075 while the other fold will show the back of ticket 001 and front of 075.

L. Non-Winning Ticket - A ticket which is not programmed to be a winning ticket or a ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401.

M. Ticket or Instant Game Ticket, or Instant Ticket - A Texas Lottery "RED HOT 5'S" Instant Game No. 1092 ticket.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general ticket validation requirements set forth in Texas Lottery Rule, §401.302, Instant Game Rules, these Game Procedures, and the requirements set out on the back of each instant ticket. A prize winner in the "RED HOT 5'S" Instant Game is determined once the latex on the ticket is scratched off to expose 64 (sixty-four) Play Symbols. In Game 1, if a player matches any of YOUR AMOUNTS play symbols to the LUCKY AMOUNT play symbol, the player wins that AMOUNT. In Game 2, if a player reveals 3 "5" play symbols in any one row, column or diagonal, the player wins PRIZE shown in PRIZE box. In Game 3, if a player reveals 3 matching play symbols in the same PLAY, the player wins PRIZE shown in PRIZE LEGEND. In Game 4, if a player matches any of YOUR NUMBERS play symbols to any of the WINNING NUMBERS play symbols, the player wins PRIZE shown for that number. If a player reveals a "5X" play symbol, the player wins 5 TIMES the PRIZE shown instantly. No portion of the display printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Instant Game.

2.1 Instant Ticket Validation Requirements.

A. To be a valid Instant Game ticket, all of the following requirements must be met:

1. Exactly 64 (sixty-four) Play Symbols must appear under the latex overprint on the front portion of the ticket;

2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;

3. Each of the Play Symbols must be present in its entirety and be fully legible;

4. Each of the Play Symbols must be printed in black ink except for dual image games;

5. The ticket shall be intact;

6. The Serial Number, Retailer Validation Code and Pack-Ticket Number must be present in their entirety and be fully legible;

7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the ticket;

8. The ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;

9. The ticket must not be counterfeit in whole or in part;

10. The ticket must have been issued by the Texas Lottery in an authorized manner;

11. The ticket must not have been stolen, nor appear on any list of omitted tickets or non-activated tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number, Retailer Validation Code and Pack-Ticket Number must be right side up and not reversed in any manner;

13. The ticket must be complete and not miscut, and have exactly 64 (sixty-four) Play Symbols under the latex overprint on the front portion of the ticket, exactly one Serial Number, exactly one Retailer Validation Code, and exactly one Pack-Ticket Number on the ticket;

14. The Serial Number of an apparent winning ticket shall correspond with the Texas Lottery's Serial Numbers for winning tickets, and a ticket with that Serial Number shall not have been paid previously;

15. The ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the 64 (sixty-four) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the 64 (sixty-four) Play Symbols on the ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Pack-Ticket Number must be printed in the Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The display printing on the ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The ticket must have been received by the Texas Lottery by applicable deadlines.

B. The ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Instant Game ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the ticket. In the event a defective ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective ticket with another unplayed ticket in that Instant Game (or a ticket of equivalent sales price from any other current Instant Lottery game) or refund the retail sales price of the ticket, solely at the Executive Director's discretion.

2.2 Programmed Game Parameters.

A. Consecutive non-winning tickets will not have identical play data, spot for spot.

B. The top prize symbol will appear on every ticket unless otherwise restricted.

C. Non-winning prize symbols will never be the same as the winning prize symbol(s).

D. GAME 1: No duplicate non-winning YOUR AMOUNTS play symbols on a ticket.

E. GAME 2: There will be a minimum of three and a maximum of five "5" play symbols on every ticket.

F. GAME 2: There will be no occurrence of any 3 matching play symbol other than the "5" appearing in a row, column or diagonal line.

G. GAME 2: This game may only win once.

H. GAME 3: There will never be three matching non-winning play symbols in a horizontal row across two PLAYS.

I. GAME 3: There will be many near wins on non-winning plays which is defined as 2 matching play symbols within a PLAY.

J. GAME 3: No duplicate non-winning PLAYS in any order on a ticket.

K. GAME 4: No duplicate non-winning YOUR NUMBERS play symbols on a ticket.

L. GAME 4: No duplicate WINNING NUMBERS play symbols on a ticket.

M. GAME 4: No 5 or more matching non-winning prize symbols.

N. GAME 4: The "5X" (5 time multiplier) play symbol will only appear as dictated by the prize structure.

O. GAME 4: No prize amount in a non-winning spot will correspond with the YOUR NUMBERS play symbol (i.e. 10 and $10).

2.3 Procedure for Claiming Prizes.

A. To claim a "RED HOT 5'S" Instant Game prize of $5.00, $10.00, $15.00, $20.00, $50.00, $100 or $500, a claimant shall sign the back of the ticket in the space designated on the ticket and present the winning ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the ticket; provided that the Texas Lottery Retailer may, but is not required to pay a $50.00, $100 or $500 ticket. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "RED HOT 5'S" Instant Game prize of $1,000, $5,000 or $50,000, the claimant must sign the winning ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning ticket for that prize upon presentation of proper identification. When paying a prize of $600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "RED HOT 5'S" Instant Game prize, the claimant must sign the winning ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, Post Office Box 16600, Austin, Texas 78761-6600. The risk of sending a ticket remains with the claimant. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct a sufficient amount from the winnings of a person who has been finally determined to be:

1. delinquent in the payment of a tax or other money collected by the Comptroller, the Texas Workforce Commission, or Texas Alcoholic Beverage Commission;

2. delinquent in making child support payments administered or collected by the Attorney General;

3. delinquent in reimbursing the Texas Health and Human Services Commission for a benefit granted in error under the food stamp program or the program of financial assistance under Chapter 31, Human Resources Code;

4. in default on a loan made under Chapter 52, Education Code; or

5. in default on a loan guaranteed under Chapter 57, Education Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize of less than $600 from the "RED HOT 5'S" Instant Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of more than $600 from the "RED HOT 5'S" Instant Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Instant Ticket Claim Period. All Instant Game prizes must be claimed within 180 days following the end of the Instant Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any prize not claimed within that period, and in the manner specified in these Game Procedures and on the back of each ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed. An Instant Game ticket may continue to be sold even when all the top prizes have been claimed.

3.0 Instant Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of an Instant Game ticket in the space designated, a ticket shall be owned by the physical possessor of said ticket. When a signature is placed on the back of the ticket in the space designated, the player whose signature appears in that area shall be the owner of the ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the ticket in the space designated. If more than one name appears on the back of the ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Instant Game tickets and shall not be required to pay on a lost or stolen Instant Game ticket.

4.0 Number and Value of Instant Prizes. There will be approximately 5,040,000 tickets in the Instant Game No. 1092. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 1092 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in**
$5	537,600	9.38
$10	403,200	12.50
$15	168,000	30.00
$20	100,800	50.00
$50	67,200	75.00
$100	13,440	375.00
$500	1,008	5,000.00
$1,000	168	30,000.00
$5,000	21	240,000.00
$50,000	8	630,000.00

*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

**The overall odds of winning a prize are 1 in 3.90. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Instant Game. The Executive Director may, at any time, announce a closing date (end date) for the Instant Game No. 1092 without advance notice, at which point no further tickets in that game may be sold.

6.0 Governing Law. In purchasing an Instant Game ticket, the player agrees to comply with, and abide by, these Game Procedures for Instant Game No. 1092, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC Chapter 401, and all final decisions of the Executive Director.

TRD-200802017
Kimberly L. Kiplin
General Counsel
Texas Lottery Commission
Filed: April 17, 2008

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Panhandle Regional Planning Commission

Request for Proposals

The Panhandle Regional Planning Commission (PRPC) is seeking proposals for a leased facility to house the Workforce Solutions Panhandle office in Hereford, Texas. The space should offer approximately 6,000 to 8,000 square feet of contiguous space that can be appropriately configured for business/professional use. The office is currently located at 121 W. Park Avenue.

A copy of the Request for Proposals can be obtained by contacting Leslie Hardin, PRPC's Workforce Development Facilities Coordinator at (806) 372-3381 or lhardin@theprpc.org. Proposals must be received at PRPC by 3:00 p.m. on May 30, 2008.

TRD-200802113
Leslie Hardin
Workforce Development Facilities Training and Support Coordinator
Panhandle Regional Planning Commission
Filed: April 22, 2008

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Public Utility Commission of Texas

Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on April 15, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Grande Communications Networks, Inc. for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35571 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the City Limits of Robinson, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35571.

TRD-200802030
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2008

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Announcement of Application for an Amendment to a State-Issued Certificate of Franchise Authority

The Public Utility Commission of Texas received an application on April 18, 2008, for an amendment to a state-issued certificate of franchise authority (CFA), pursuant to §§66.001 - 66.016 of the Public Utility Regulatory Act (PURA).

Project Title and Number: Application of Time Warner Cable for an Amendment to a State-Issued Certificate of Franchise Authority, Project Number 35579 before the Public Utility Commission of Texas.

The requested amended CFA service area includes the City Limits of Columbus, Texas.

Information on the application may be obtained by contacting the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All inquiries should reference Project Number 35579.

TRD-200802123
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 22, 2008

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Notice of Application for Amendment to Certificated Service Area Boundary

Notice is given to the public of an application filed on April 7, 2008, with the Public Utility Commission of Texas for an amendment to a certificated service area boundary.

Docket Style and Number: Application of Guadalupe Valley Telephone Cooperative, Inc. to Amend a Certificate of Convenience and Necessity for a Minor Boundary Amendment Between the Sabina Exchange and Verizon SW Boerne Exchange (Lerin Hills Subdivision). Docket Number 35544.

The Application: The application is being filed to amend the boundary between Guadalupe Valley Telephone Cooperative, Inc.'s (GVTC) Sabina exchange and Verizon SW's (Verizon) Boerne exchange. The proposed boundary change is being made to encompass all of the Lerin Hills Subdivision into Verizon's Boerne exchange so that the entire subdivision will be served by Verizon. Verizon has provided a letter of concurrence endorsing this proposed change.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by May 9, 2008, by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 35544.

TRD-200802053
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2008

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Notice of Application for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider

Notice is given to the public of an application filed with the Public Utility Commission of Texas on April 11, 2008, for designation as an eligible telecommunications carrier (ETC) pursuant to P.U.C. Substantive Rule §26.418, and designation as an eligible telecommunications provider (ETP) pursuant to P.U.C. Substantive Rule §26.417.

Docket Title and Number: Application of Quality Telephone for Designation as an Eligible Telecommunications Carrier and Eligible Telecommunications Provider. Docket Number 35562.

The Application: The company is requesting ETC and ETP designation in the exchanges and study areas of Southwestern Bell Telephone Company d/b/a AT&T Texas, Verizon Southwest, Embarq, and Consolidated Communications.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by May 20, 2008. Requests for further information should be mailed to the Public Utility Commission of Texas, P.O. Box 13326, Austin, Texas 78711-3326, or you may call the Public Utility Commission's Customer Protection Division at (512) 936-7120 or (888) 782-8477. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (800) 735-2989 to reach the commission's toll free number (888) 782-8477. All comments should reference Docket Number 35562.

TRD-200802114
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 22, 2008

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on April 14, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Peerless Network of Texas, LLC for a Service Provider Certificate of Operating Authority, Docket Number 35565 before the Public Utility Commission of Texas.

Applicant intends to provide facilities-based and resale telecommunications services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 7, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35565.

TRD-200802029
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2008

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Notice of Application for Service Provider Certificate of Operating Authority

Notice is given to the public of the filing with the Public Utility Commission of Texas of an application on April 15, 2008, for a service provider certificate of operating authority (SPCOA), pursuant to §§54.151 - 54.156 of the Public Utility Regulatory Act (PURA).

Docket Title and Number: Application of Kentucky Data Link, Inc. for a Service Provider Certificate of Operating Authority, Docket Number 35569 before the Public Utility Commission of Texas.

Applicant intends to provide plain old telephone service, ADSL, ISDN, Optical Services, T1-Private Line, Frame Relay, Fractional T1, and long distance services.

Applicant's requested SPCOA geographic area includes the entire State of Texas.

Persons who wish to comment upon the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 7, 2008. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35569.

TRD-200802051
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2008

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Notice of Application for Waiver From Requirements

Notice is given to the public of an application filed on April 15, 2008 with the Public Utility Commission of Texas (commission) for waiver of certain reporting requirements in P.U.C. Substantive Rules Chapter 26, Subchapters C and D.

Docket Style and Number: Application of Southwest Arkansas Telephone Cooperative, Inc., for Waiver of Certain Reporting Requirements in P.U.C. Substantive Rules Chapter 26, Subchapters C and D. Docket Number 35570.

The Application: Southwest Arkansas Telephone Cooperative, Inc. (Southwest Arkansas) is a local exchange carrier authorized to provide telephone service in the Bloomburg exchange in Texas under Certificate of Convenience and Necessity No. 40078. The number of access lines served by Southwest Arkansas exclusively in Texas is 488, or less than 9% of the Cooperative's total lines. Applicant is subject to the requirements of the commission's Substantive Rules, specifically Chapter 26, Subchapters C and D, which require the filing of various periodic reports per the general procedures and requirements outlined in P.U.C. Substantive Rule §26.71. The Cooperative believes certain reporting requirements are unduly burdensome and therefore requests

a waiver from these requirements pursuant to P.U.C. Procedural Rule §22.5(b) for good cause.

Persons wishing to comment on the action sought or intervene should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll-free at 1-888-782-8477. Hearing and speech-impaired individuals with text telephone (TTY) may contact the commission at (512) 936-7136 or use Relay Texas (toll-free) 1-800-735-2989. All comments should reference Docket Number 35570.

TRD-200802054
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 18, 2008

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Notice of Application to Relinquish a Service Provider Certificate of Operating Authority

On April 18, 2008, U.S. Online filed an application with the Public Utility Commission of Texas (commission) to relinquish its service provider certificate of operating authority (SPCOA) granted in SPCOA Certificate Number 60025. Applicant intends to relinquish its certificate.

The Application: Application of U.S. Online to relinquish its Service Provider Certificate of Operating Authority, Docket Number 35582.

Persons wishing to comment on the action sought should contact the Public Utility Commission of Texas by mail at P.O. Box 13326, Austin, Texas 78711-3326, or by phone at (512) 936-7120 or toll free at 1-888-782-8477 no later than May 7, 2008. Hearing and speech-impaired individuals with text telephones (TTY) may contact the commission at (512) 936-7136 or toll free at 1-800-735-2989. All comments should reference Docket Number 35582.

TRD-200802122
Adriana A. Gonzales
Rules Coordinator
Public Utility Commission of Texas
Filed: April 22, 2008

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Texas State Technical College System

Invitation to Bid (ITB) on Economic Consulting Services

ITB Number: SYS042308

The Texas State Technical College System intends to enter into a contract with a consultant to determine the economic impact of the Texas State Technical College System on business activity in Texas, with an emphasis on enhancing the effectiveness of workforce training in Texas.

Texas is a part of an intense global competition to attract and retain business activity in existing and emerging technological sectors that support economic growth and prosperity. Although there are many factors that play a role in determining the location of desirable industries, one of the most critical is the availability of a well-trained, technical workforce to sustain complex production processes. A substantial number of these needed employees will require baccalaureate and advanced degrees, but recent research indicates that approximately 70 percent of them will be from fields that are based on sophisticated technical training.

The TSTC System has been a vital part of the educational complex of the state for decades and is a major source of skilled workers that serve to make Texas competitive for high growth enterprises. At present, however, TSTC receives much of its funding based on a set of parameters and formulas which is less than optimal. In particular, the current approach provides incentives to maximize contact hours and offer two-year programs. In reality, many of the most critical technical occupations currently require certifications and training that can be accomplished in a shorter period of time. Both students and employers prefer this approach, and it is more in line with the overall curricula and programs of TSTC within the Texas educational complex. Thus, the current funding mechanism creates inefficiencies and outcomes which neither make the best use of fiscal resources nor maximize the potential benefits to economic competitiveness. To alleviate this situation, TSTC is proposing a new approach to its appropriations which is results-oriented and tied to its economic and revenue contributions. The purpose of the consulting services sought is to quantify the potential benefits of this alternative mechanism.

The CEO of the Texas State Technical College (TSTC) System, Chancellor Bill Segura, finds that these consulting services are necessary for the following reason: this consulting engagement requires expertise and resources that are not readily available in house, including econometric and impact assessment models that are specific to the State of Texas, and extensive knowledge and expertise in the field of economics as they apply to the State of Texas.

Unless better offers are received, it is the intention of the TSTC System to award the contract for these services to The Perryman Group, a Texas-based economic consulting organization, as they have the requisite resources and expertise, and they have, in the past, conducted economic impact studies for TSTC.

For further information, please email:

Dr. J. Gary Hendricks, Vice Chancellor for Financial & Administrative Services

Texas State Technical College System

3801 Campus Drive

Waco, Texas 76705

Email: ghendricks@systems.tstc.edu

Deadline for the receipt of offers: 2:00 p.m. May 23, 2008. Send offers to the contact noted above.

The contract will be awarded based on an evaluation of the offers by an Evaluation Team. Criteria will include: 1) prior experience with TSTC; 2) consultant's resources and expertise; 3) suitability of consultant's plan of work; 4) time required for conducting the services; and, 5) reasonableness of price.

TRD-200802135
Dr. J. Gary Hendricks
Vice Chancellor for Financial and Administrative Services
Texas State Technical College System
Filed: April 23, 2008

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Request for Proposal

RFP Number: SLR050208

Pursuant to Texas Government Code §2254, Texas State Technical College System (TSTC) requests the submission of proposals leading to the award of a major consulting services contract. TSTC intends to enter into a contract with a consultant to provide Information Technology

(IT) Consulting services. The purpose of this engagement is to develop recommendations to bring TSTC into compliance with all State of Texas rules, statutes and guidelines for IT security requirements.

Pursuant to the provisions of Texas Government Code, Chapter 2254, the Chancellor of TSTC has made a finding that Consulting Services are necessary. While TSTC System has many capacities for conducting studies and research into our operations, the task involves resources that are not readily available to us, namely, trained and qualified IT security personnel to successfully accomplish the task.

Pursuant to the provisions of Texas Government Code, Chapter 2254, the award for services will be based on demonstrated competence, knowledge, and qualifications and on the reasonableness of the proposed fee for the services; and if other considerations are equal, preference will be given to a consultant whose principal place of business is in the State of Texas or who will manage the consulting contract wholly from an office in the state.

TSTC will comply with §2254.027 of the Texas Government Code regarding the selection of a consultant. Responses will be evaluated under the evaluation criteria outlined in the complete RFP.

Previously, TSTC awarded a contract to K2Share, LLC (K2Share) for similar services and was very pleased with the work. Unless a better offer is received, TSTC intends to award this contract to K2Share, LLC of College Station Texas. K2Share is an approved DIR Go DIRect vendor (Vendor ID 174-296-8368-0030) under the DIR contract number DIR-SDD-654.

A complete copy of the RFP can be downloaded from the Texas Marketplace, Electronic State Business Daily (ESBD) website at http://esbd.cpa.state.tx.us/.

The deadline for the receipt of proposals is June 2, 2008.

For more information, please contact:

Sammy L. Rhodes, Associate Vice Chancellor and CIO

Texas State Technical College System

3801 Campus Drive

Waco, Texas 76705

Email: sammy.rhodes@systems.tstc.edu

TRD-200802136
Sammy L. Rhodes
Associate Vice Chancellor and Chief Information Officer
Texas State Technical College System
Filed: April 23, 2008

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Texas Department of Transportation

Public Notice - Aviation

Pursuant to Transportation Code, §21.111, and Title 43, Texas Administrative Code, §30.209, the Texas Department of Transportation conducts public hearings to receive comments from interested parties concerning proposed approval of various aviation projects.

For information regarding actions and times for aviation public hearings, please go to the following web site:

www.txdot.gov/about_us/public_hearings_and_meetings/aviation.htm

Or visit **www.txdot.gov**, click on Citizen, click on Public Hearings, and then click on Aviation.

Or contact Texas Department of Transportation, Aviation Division, 150 East Riverside, Austin, Texas 78704, (512) 416-4501 or 1-800-68-PILOT.

TRD-200802125
Joanne Wright
Deputy General Counsel
Texas Department of Transportation
Filed: April 22, 2008

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The University of Texas System

Notice on Entering into Major Consulting Services Contract

In accordance with the provisions of Chapter 2254, *Texas Government Code*, The University of Texas System Administration has entered into a contract for consulting services more particularly described in the Request for Qualifications for Professional or Consulting Services for Conceptual Master Planning for the Development of the Brackenridge Tract, published in the *Texas Register* on December 21, 2007 (32 TexReg 9877). The consultant will develop master plans for the development of the Brackenridge Tract in Austin, Texas. The focus of the conceptual master plans will be the strategic use of the Brackenridge Tract to support the educational mission of The University of Texas at Austin. The plans will be integrated planning documents that consider building sites, streets, parking and land uses; utility infrastructure and capacity; transportation within the tract and between the tract, the surrounding neighborhood, and arterials; recreational and open space, community services, and landscaping; way-finding/graphics; design guidelines, including building heights; compatibility with surrounding neighborhoods; sustainability and stewardship of resources; environmental and endangered species issues; and other relevant components.

The name and address of the consultant is as follows:

Cooper, Robertson & Partners, LLP

311 West 43rd Street

New York, New York 10036

The University of Texas System will pay a not to exceed fixed fee amount of $4,590,782.00, and reimbursable expenses not to exceed $549,100.00. The initial term of the contract shall be for a period starting April 21, 2008, through approximately May or June 2009. The conceptual master plans are due on or about May or June 2009.

Any questions regarding this posting should be directed to:

Ms. Florence P. Mayne

Executive Director

Real Estate Office

The University of Texas System

201 West 7th Street, Suite 416

Austin, Texas 78701

Voice: (512) 499-4333

TRD-200802147
Francie A. Frederick
General Counsel to the Board of Regents
The University of Texas System
Filed: April 23, 2008

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How to Use the Texas Register

Information Available: The 14 sections of the ***Texas Register*** represent various facets of state government. Documents contained within them include:

Governor - Appointments, executive orders, and proclamations.

Attorney General - summaries of requests for opinions, opinions, and open records decisions.

Secretary of State - opinions based on the election laws.

Texas Ethics Commission - summaries of requests for opinions and opinions.

Emergency Rules- sections adopted by state agencies on an emergency basis.

Proposed Rules - sections proposed for adoption.

Withdrawn Rules - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

Adopted Rules - sections adopted following public comment period.

Texas Department of Insurance Exempt Filings - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

Texas Department of Banking - opinions and exempt rules filed by the Texas Department of Banking.

Tables and Graphics - graphic material from the proposed, emergency and adopted sections.

Transferred Rules- notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

In Addition - miscellaneous information required to be published by statute or provided as a public service.

Review of Agency Rules - notices of state agency rules review.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

How to Cite: Material published in the ***Texas Register*** is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 30 (2005) is cited as follows: 30 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "30 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 30 TexReg 3."

How to Research: The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the ***Texas Register*** office, Room 245, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using ***Texas Register*** indexes, the ***Texas Administrative Code***, section numbers, or TRD number.

Both the ***Texas Register*** and the ***Texas Administrative Code*** are available online through the Internet. The address is: http://www.sos.state.tx.us. The ***Register*** is available in an .html version as well as a .pdf (portable document format) version through the Internet. For website subscription information, call the Texas Register at (800) 226-7199.

Texas Administrative Code

The ***Texas Administrative Code (TAC***) is the compilation of all final state agency rules published in the ***Texas Register***. Following its effective date, a rule is entered into the ***Texas Administrative Code***. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the ***TAC***.

The ***TAC*** volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete TAC is available through the Secretary of State's website at http://www.sos.state.tx.us/tac. The following companies also provide complete copies of the TAC: Lexis-Nexis (1-800-356-6548), and West Publishing Company (1-800-328-9352).

The Titles of the ***TAC***, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

How to Cite: Under the ***TAC*** scheme, each section is designated by a ***TAC*** number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the ***Texas Administrative Code***; ***TAC*** stands for the ***Texas Administrative Code***; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

How to update: To find out if a rule has changed since the publication of the current supplement to the ***Texas Administrative Code***, please look at the ***Table of TAC Titles Affected***. The table is published cumulatively in the blue-cover quarterly indexes to the ***Texas Register*** (January 21, April 15, July 8, and October 7, 2005). If a rule has changed during the time period covered by the table, the rule's ***TAC*** number will be printed with one or more ***Texas Register*** page numbers, as shown in the following example.

TITLE 40. SOCIAL SERVICES AND ASSISTANCE
Part I. Texas Department of Human Services
40 TAC §3.704.....950, 1820

The ***Table of TAC Titles Affected*** is cumulative for each volume of the ***Texas Register*** (calendar year).